

Wild Oats Markets, Inc. and Local 371, United Food and Commercial Workers International Union, AFL-CIO. Cases 34-CA-9586, 34-CA-9824, 34-CA-9836, and 34-CA-9837

May 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On June 24, 2002, Administrative Law Judge Steven Fish issued the attached decision.¹ The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.³

The judge found that the Respondent committed various unfair labor practices in response to efforts by Local

371, United Food and Commercial Workers International Union, AFL-CIO (the Union) to organize employees at the Respondent's store in Westport, Connecticut. The Respondent excepts to all of the judge's unfair labor practice findings. We find merit in the Respondent's exceptions only insofar as they relate to one 8(a)(1) finding, discussed below. We find it unnecessary to pass on a second 8(a)(1) finding for the reasons set forth below. With respect to all of the remaining violations, we adopt the judge's decision.⁴

1. The judge found that the Respondent unlawfully threatened employees with loss of benefits, in violation of Section 8(a)(1), by stating in a flyer to employees that "in collective bargaining you could lose what you have now." We disagree. Considered by itself, the statement was a factually accurate observation regarding a possible negative outcome of collective bargaining, which is protected speech under Section 8(c). See *UARCO, Inc.*, 286 NLRB 55, 58 (1987), petition for review denied 865 F.2d 258 (6th Cir. 1988). Significantly, the statement appeared in a flyer not otherwise alleged to be unlawful, which depicted a union authorization card and explained possible negative outcomes of engaging in the collective-bargaining process.⁵ Unlike the judge, we decline to find that the Respondent's unfair labor practices compel a

¹ We have corrected the judge's decision to reflect the proper spelling of discriminatee Beverly Hammons' name and to correct additional inadvertent errors as follows. In fn. 11 of the decision, the judge referred to the "complaint in Case 39-CA-9586 herein." The case number should be Case 34-CA-9586. In sec. III,A,14, the judge found that Kristin Coppola testified that she applied for a job with the Respondent on July 23, 2001. In fact, Coppola testified that she applied for a job with the Respondent in January 2001. In the last paragraph of the same section, the judge stated, "Respondent also did call Gilliland as a witness . . ." The sentence should read, "Respondent also did not call Gilliland as a witness . . ." In sec. III,C,14, the judge stated, "Bernier continued to insist that Bernier had lied about him in front of other employees." The sentence should read, "Bernier continued to insist that Reder had lied about him in front of other employees."

In sec. II,B of his decision, the judge referred to a decision issued on November 20, 2001, by Administrative Law Judge Michael A. Marcionese (Cases 34-CA-9243 and 34-CA-9278). That decision was affirmed by the Board in *Wild Oats Markets*, 339 NLRB 81 (2003).

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We have amended the remedy section of the judge's decision, first, to include an inadvertently omitted remedy for the Respondent's unlawful refusal to consider Food For Thought employees for positions at its Westport, Connecticut store and, second, to provide the appropriate method of calculating backpay for employee Rosemary Reder. We have also modified the judge's recommended Order in light of our findings herein and in accordance with the Amended Remedy and our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Ferguson Electric Co.*, 335 NLRB 142 (2001). Finally, we have substituted a new notice to comport with these modifications and with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

⁴ In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) by reducing employee Rosemary Reder's hours and refusing to give her a set schedule, we find it unnecessary to rely, as did the judge, on the antiunion comments of Manager Kristin Coppola. The Respondent's other unfair labor practices found herein, including its threat to suspend Reder in retaliation for her protected activity, amply support the judge's finding of antiunion animus.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) when it posted a no-solicitation rule on March 15, 2001, Member Schaumber is satisfied that, in light of the specific credited testimony and other record evidence, the rule was promulgated "in response to" union activity within the meaning of the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, slip op. at 1-2 (2004). In particular, the Respondent's human resource manager informed the store managers at the time of posting that Respondent was "trying to keep them [the Union] out," there was no evidence that a similar policy had been posted at any of Respondent's other stores, one of Respondent's managers testified that he had never seen such a policy at the Respondent's other stores, and the Respondent's witnesses offered no justification, apart from interfering with union organizing activity, for instituting the new policy.

⁵ We disagree with our dissenting colleague that the context of the flyer renders the quoted statement coercive. The elements of the flyer upon which our dissenting colleague relies were not alleged to be unlawful. Although the flyer depicted a union authorization card, the allegedly unlawful comment was next to an arrow pointing to the words "collective bargaining." Thus, the clear inference is that the loss of benefits was a possible consequence of collective bargaining, not a possible consequence of simply signing a union card. Neither the General Counsel nor our dissenting colleague disputes that an employer can lawfully inform employees about the potential pitfalls of the collective-bargaining process.

violation finding here, where the statement itself and its immediate context were noncoercive.

Medical Center of Ocean County, 315 NLRB 1150, 1154 (1994), and *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), cited by the judge, are factually distinguishable. In *Medical Center of Ocean County*, unlike here, the statement in question (“[y]ou could lose your benefits”) contained no reference whatsoever to collective bargaining. In *Taylor-Dunn*, the employer’s statements were susceptible to the interpretation that the employer intended to discontinue existing benefits prior to bargaining and force the union to negotiate restoration of those benefits. Here, by contrast, the Respondent’s comment did not reasonably tend to indicate that the Respondent intended to take away benefits prior to negotiations. We accordingly reverse the judge’s finding that the Respondent unlawfully threatened employees with loss of benefits.⁶

2. The judge found that the Respondent unlawfully threatened employees with job loss or other unspecified reprisals by stating in a letter to employees that the Union “would hurt business which we all depend on for our livelihood.” We find it unnecessary to pass on this issue. The Board has adopted the judge’s findings that the Respondent threatened job loss when it told employee Mary Roland that employee Diane Lane had been discharged for talking to the Union and when it told employees that “when unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced.” The finding of an additional job-loss threat would not materially affect the remedy and would therefore be cumulative.

AMENDED REMEDY

We find that the remedy outlined in *FES*⁷ for an unlawful refusal to consider for hire is appropriate here, in light of the violations found.⁸ Accordingly, we will

⁶ Member Liebman would find that, in context, the quoted statement from Respondent’s flyer violated Sec. 8(a)(1). The flyer equated signing a union authorization card with signing a “blank check,” and listed a host of horrible consequences that could ensue, including loss of “what you have now.” Thus, the statement in question, considered not in isolation but in the context of the flyer as a whole, could have reasonably led employees to believe that they could lose existing benefits merely by signing a card authorizing the Union to represent them in collective bargaining.

⁷ 331 NLRB 9, 15 (2000), supplemental decision 333 NLRB 66 (2001), enf. 301 F.3d 83 (3d Cir. 2002).

⁸ The Respondent refused to hire and to consider for hire eight named employees of Food For Thought: Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira. These individuals are entitled to the remedy for unlawful refusal to hire—instantement and backpay—which subsumes the remedy for the Respondent’s refusal to consider them for hire. *Jobsite Staffing*, 340 NLRB 332, 333 (2003). The

modify the judge’s recommended Order to comport with *FES*. Specifically, in addition to the remedy provided in the judge’s decision, we shall order that the Respondent consider for future employment, in accord with nondiscriminatory criteria, all employees of Food For Thought, Norwalk, Connecticut, who would have been considered for employment but for the unlawful discrimination against them. We shall also order that the Respondent notify these Food For Thought employees, the Union, and the Regional Director for Region 34 in writing of future openings in positions for which these employees applied or would have applied absent the discrimination, or substantially equivalent positions. The Respondent will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance.⁹ If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, the Respondent would have selected any of these employees for any job openings arising after the beginning of the hearing on November 7, 2001, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall be ordered to hire them for any such position, and to make them whole for any loss of earnings and other benefits that they may have suffered due to the unlawful actions taken against them in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The judge’s remedy calls for all backpay to be computed in the manner prescribed in *F. W. Woolworth*, supra. The *F. W. Woolworth* formula, however, is inappropriate for the calculation of discriminatee Rosemary Roder’s backpay. The Board applies *F. W. Woolworth* to remedy violations of the Act involving cessation or denial of employment. See, e.g., *CAB Associates*, 340

refusal-to-consider remedy provided here is for those Food For Thought employees in addition to the eight above-named discriminatees who were also unlawfully refused consideration. We leave to compliance the identification of additional individuals, if any, within this class of discriminatees. See, e.g., *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109, 142 (1995). We observe, however, that the mere fact that an individual did not submit an application to the Respondent does not necessarily disqualify him or her from inclusion within the class, where the individual can show that submitting an application would have been futile. See *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 81 fn. 10 (1979) (“[W]here an employer makes known to prospective employees his refusal to hire them because of their prior union affiliation, their failure to undertake the useless act of making formal application for work is no defense to an 8(a)(3) allegation.”), enf. in relevant part and remanded 640 F.2d 1094 (9th Cir. 1981); see also *Corporate Interiors, Inc.*, 340 NLRB 732, 750 (2003).

⁹ *FES*, supra, 331 NLRB at 15 fn. 15.

NLRB 1391, 1393 (2003). Reder suffered no cessation or denial of employment as a result of the Respondent's unlawful conduct toward her. (Her work hours were reduced.) Under these circumstances, Reder's backpay should be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971). See *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

ORDER

The National Labor Relations Board orders that the Respondent, Wild Oats Markets, Inc., Westport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their activities on behalf or in support of Local 371, United Food and Commercial Workers International Union, AFL-CIO (the Union).

(b) Creating the impression that the union activities of its employees are under surveillance.

(c) Threatening its employees with discharge, job loss, or suspension if they engage in activities on behalf or in support of the Union, or if the Union becomes the collective-bargaining representative of its employees.

(d) Maintaining rules that prohibit employees from engaging in solicitation in nonwork areas of its store during nonworktime, or from distributing literature in nonwork areas during nonworktime, or maintaining any rule that requires employees to obtain permission in order to engage in the above-described activities.

(e) Promulgating, maintaining, or enforcing no-solicitation/no-distribution rules, or any other rules, for the purpose of discouraging union activities.

(f) Discharging employees, reducing the hours of employees, refusing to give employees a set work schedule, or refusing to hire or consider hiring employees because of their activities on behalf or in support of the Union, because they engage in other protected concerted activities, or because NLRB charges were filed on their behalf.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the no-solicitation/no-distribution rule that it issued on or about March 15, 2001, and notify all employees in writing that this has been done.

(b) Notify its employees in writing that the no-solicitation rule that appears in the employee manual is no longer in effect, and insert a written notice in the employee manual where the rule appears, advising that the rule has been rescinded.

(c) Within 14 days from the date of this Order, offer Diane Lane full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Diane Lane and Rosemary Reder whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision as amended herein.

(e) Within 14 days from the date of this Order, offer Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira reinstatement to the positions for which they applied or sought to apply or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

(f) Make Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision as amended herein.

(g) Apart from the discriminatees named above, consider for future employment, in accord with nondiscriminatory criteria, all employees of Food For Thought, Norwalk, Connecticut, who would have been considered for employment but for the unlawful discrimination against them, and notify these employees, the Union, and the Regional Director for Region 34 in writing of future openings in positions for which these employees applied or would have applied, or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, the Respondent would have selected any of these employees for any job openings arising after the beginning of the hearing on November 7, 2001, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, the Respondent shall hire them for any such position and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the amended remedy section of this decision and order.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Diane Lane, the unlawful reduction of Rosemary Reder's hours and refusal to give her a set work schedule, and the unlawful refusal to consider for hire or hire Steven Clark,

Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira, and within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

(i) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Westport, Connecticut facility, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 2001.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf or in support of Local 371, United Food and Commercial Workers International Union, AFL-CIO (the Union).

WE WILL NOT create the impression that the union activities of our employees are under surveillance.

WE WILL NOT threaten our employees with discharge, job loss, or suspension if they engage in activities on behalf or in support of the Union, or if the Union becomes the collective-bargaining representative of our employees.

WE WILL NOT maintain rules that prohibit employees from engaging in solicitation in nonwork areas of our store during nonworktime, or from distributing literature in nonwork areas during nonworktime, or maintain any rule that requires employees to obtain permission from us in order to engage in the above described activities.

WE WILL NOT promulgate, maintain, or enforce no-solicitation/no-distribution rules, or any other rules, for the purpose of discouraging union activities.

WE WILL NOT discharge our employees, reduce the hours of our employees, refuse to give our employees set work schedules, or refuse to hire or consider hiring employees because of their activities on behalf or in support of the Union, because they engage in other protected concerted activities, or because NLRB charges are filed on their behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL rescind the no-solicitation/no-distribution rule that we issued on or about March 15, 2001, and notify all employees in writing that this has been done.

WE WILL notify our employees in writing that the no-solicitation rule that appears in the employee manual is no longer in effect, and insert a written notice in the employee manual where the rule appears, advising that the rule has been rescinded.

WE WILL, within 14 days from the date of the Board's Order, offer Diane Lane full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diane Lane and Rosemary Reder whole for any loss of earnings and other benefits suffered

as a result of the discrimination against them, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira employment in the positions for which they applied or sought to apply or, if these positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them.

WE WILL make Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL consider for future employment, in accord with nondiscriminatory criteria, all employees of Food For Thought, Norwalk, Connecticut, who would have been considered for employment but for the unlawful discrimination against them, and WE WILL notify these employees, the Union, and the Regional Director for Region 34 in writing of future openings in positions for which these employees applied or would have applied, or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, we would have selected any of these employees for any other job openings, we shall hire them for any such position and make them whole, with interest, for any loss of earnings and other benefits.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Diane Lane, the unlawful reduction of Rosemary Reder's hours and refusal to give her a set work schedule, and the unlawful refusal to consider for hire or hire Steven Clark, Beverly Hammons, Julius Laloi, Rosette Louis, Teresa Monteleone, Rajshree Parikh, Maria Sandalo, and Libya Silveira, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that these unlawful actions will not be used against them in any way.

WILD OATS MARKETS, INC.

Darryl Hale, Esq., for the General Counsel.
Thomas R. Gibbons, Esq. and *Edward V. Jeffrey, Esq.* (*Jackson, Lewis, Schnitzler & Krupman*), of Hartford, Connecticut, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 371, United Food and Commercial Workers International Union, AFL-CIO (Lo-

cal 371 or the Union), the Regional Director for Region 34 issued a complaint and notice of hearing on August 15, 2001,¹ alleging that Wild Oats Markets, Inc. (the Respondent), violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment employees previously employed by Food For Thought and refusing to consider or to hire eight named discriminatees. The complaint also alleges that Respondent violated Section 8(a)(1) of the Act by implementing a rule prohibiting employees from engaging in union or other protected concerted activities in nonwork areas on nonworktime, and by threatening employees with discharge if they engaged in union or other protected activities in nonwork areas nonworktime.

Subsequently, pursuant to several additional charges filed by the Union, the Director on October 26, issued an order consolidating cases, complaint, and notice of hearing, alleging that Respondent violated Section 8(a)(1) of the Act by various acts of threats, interrogations, and creating the impression among its employees that their union activities were under surveillance, Section 8(a)(3) of the Act by terminating Diane Lane and Mary Roland, and Section 8(a)(3) and (4) of the Act by reducing the hours of Rosemary Reder and refusing to give her a set work schedule.

Also on October 26, the Regional Director issued an Order further consolidating all of the above cases for hearing.

The trial with respect to the complaint allegations detailed above was held before me, on November 7, 8, 9, and 19, in Hartford, Connecticut. During the trial I granted the General Counsel's motion to amend the complaint to allege that Respondent violated Section 8(a)(1) of the Act by maintaining an overbroad no-solicitation rule, and by maintaining another no-solicitation rule in response to the Union's organizing campaign.

Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, a corporation, with an office and place of business in Westport, Connecticut, has been engaged in the operation of a retail natural food store. During the 12-month period ending September 30, 2001, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its facility, goods valued in excess of \$50,000 directly from points located outside the State of Connecticut. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRIOR CASES

A. Wild Oats Markets, Inc., 336 NLRB 179 (2001)

On September 28, 2001, the Board issued a Decision and Order in Case 14-CA-24815, finding that Wild Oats Community Markets violated Section 8(a)(1) of the Act at its store

¹ All dates are in 2001 unless otherwise indicated.

located in Ladue, Missouri, by attempting to cause the police department to arrest union representatives,² who were picketing and distributing leaflets in the parking lot in front of the store. The Board concluded that since the parking lot was the property of the owner of the strip mall, that Respondent therein did not have a sufficient property interest in the parking lot to justify its actions in attempting to expel the union representatives. The unlawful conduct found by the Board, took place on October 16, 1997.

A key issue in that case was whether Respondent's conduct of informing the owner of the property of the presence of the union picketers, with knowledge of the owners no-solicitation rule,³ constituted an indirect attempt to expel the union representatives, in violation of the Act. The Board concluded the conduct was unlawful, and in response to Respondent's free speech contention, observed that if Respondent had directly asked the police to remove the union representatives or directly asked the union representatives to leave, it is clear its actions would be unlawful; as such employer "speech" would violate employee rights protected by the Act. Thus, the Board observed, that "accordingly, it would be anomalous to accord the Respondent's communication of the same message greater First Amendment protection simply because the Respondent sought to accomplish indirectly that which it was prohibited from doing directly."

*B. Wild Oats Markets, Inc., JD(NY)-58-02,
Cases 34-CA-9243 and 34-CA-9278*

On November 20, 2001, Administrative Law Judge Michael A. Marcionese, issued a decision and recommended Order in the above cases. The trial dealt with alleged unlawful conduct by Respondent, when it owned a store in Norwalk, Connecticut, called Food For Thought, which it acquired on April 30, 1999.

The judge found therein that Respondent by the end of 2000 operated 106 natural food stores, throughout the United States and Canada. Until April 2000, no union had ever successfully organized any of Respondent's employees. However, on February 8, 2000, the Union filed a petition to represent its employees at the Norwalk store, which as noted Respondent had acquired some 9 months before. The Union pursuant to a Stipulated Election Agreement, won an election on April 3, 2000, and after the Regional Director overruled objections filed by Respondent, certified the Union as the representative of Respondent's employees.

The alleged unfair labor practices litigated took place between February and April 2000, and dealt with Respondent's campaign and alleged 8(a)(1) statements, as well as an alleged unlawful refusal to make payments into its profit-sharing campaign.

The complaint alleged that Respondent by Gregory Seymour, Respondent's north east regional director violated Section 8(a)(1) of the Act by impliedly promising benefits and soliciting grievances at a meeting of employees on February 16,

² The Union in that case was Local 655 of the United Food and Commercial Workers, AFL-CIO.

³ It was stipulated that Respondent did not have a no-solicitation or no-distribution rule at this time.

2000. The judge recommended dismissal of this allegation based primarily on credibility resolutions.

It was also alleged that Respondent, by Ahmed Abbes, its food service manager, violated Section 8(a)(1) of the Act, by several statements to employees. In that regard, the judge credited the testimony of employee witnesses Libya Silveira, Rosette Louis, and Rock Michel, and found that Respondent violated the Act when Abbes singled out Silveira for criticism in front of coworkers as a union supporter, interrogated employees, created the impression that their attendance at union meetings were under surveillance, threatened employees with reduced hours if they voted in favor of the Union, promised employees benefits if they did not vote for the Union, and threatened to sell or close the store, because they voted for the Union.

The complaint also alleged that Respondent by Michel Gilliland, its founder, president, and CEO, violated Section 8(a)(1) of the Act by promising benefits and soliciting grievances. The judge found that based on the denied testimony of employee Michel,⁴ that Gilliland came to the store⁵ on March 31, 2000, and met with Michel to discuss the Union and the pending election. Gilliland told Michel that Respondent was strongly opposed to the Union and wanted employees to vote "no." He added that Respondent would do whatever it can to prevent a Union from coming into the store, and asked "what is the problem that we need a Union for?" Michel replied that his reason for supporting the Union was that Jamaican employees who worked in the front of the store were treated better than the Haitians.⁶ Gilliland thanked Michel for the information and said that he was going to talk to the store manager. Gilliland also gave Michel his business card with his home and office phone number and fax number and told Michel to call him anytime he wanted to let Gilliland know what was going on. Michel also testified that Gilliland met with other employees on that same day, and gave them the same business card.

The judge, based on these facts, concluded that Gilliland had implicitly promised to take care of Michel's problem that caused him to support the Union, i.e., the difference in treatment of Jamaican and Haitian employees, and thereby violated Section 8(a)(1) of the Act.⁷

Finally, the judge found with respect to the allegation concerning the failure to pay into its profit sharing fund in April 2000, that General Counsel had met its initial *Wright Line*⁸ burden of proof, that the employees' decision to support the Union was a motivating factor in Respondent's action in failing to pay any profit sharing after the election. In support of this conclusion, the judge relied on the fact that employees had always received profit sharing and the first time that they did not, was the month after the election, which as noted the Union won. Moreover, the evidence revealed that Respondent's officials "overruled" its profit-sharing rules by paying the bonus in the month immediately before the election, and Respondent's

⁴ Gilliland did not testify.

⁵ Respondent's headquarters are in Colorado.

⁶ Michel is Haitian.

⁷ The judge also found that Gilliland had in fact held similar one-on-one meetings with other employees on March 31.

⁸ 251 NLRB 1083 (1980).

campaign literature touted the profit sharing as one of the benefits provided by Respondent without the benefit of the Union.

However, the judge then concluded that Respondent had met its burden of proving that no profit-sharing bonus would have been paid to the store absent union activity, since the records submitted in evidence demonstrated that the store did not meet the preexisting criteria for eligibility for the bonus. The judge did recognize that Respondent's official, Lewis (who testified about the bonus), had exercised her discretion to grant the bonus to override the plan's guidelines and authorize the profit sharing when the store did not meet the criteria in the month just before the election. However, he credited her testimony that she was not motivated by any union activity when she decided not to exercise this discretion in the following months. The judge concluded that just because Lewis overlooked the store's failure to meet the guidelines in the plan, does not mean that she had to keep paying a bonus each month as the store's performance declined, and that the employees' vote for the Union did not entitle them to receive a profit-sharing check when the store failed to meet the plans requirements. Therefore, the judge recommended dismissal of the 8(a)(1) allegation with respect to this action, concluding that the failure to pay the bonus was not a change of a condition of employment, but was consistent with the plan.

III. FACTS

A. *The Refusal to Hire*

Shortly after the Union's election victory in April 2000 at its Norwalk Food For Thought store, Respondent notified the Union that it was selling the store to Grange Investments, Inc. The sale closed on August 7, 2000, and was part of a sale of two other of Respondent's stores to Grange.

When Grange assumed ownership of the store on August 7, it retained a majority of management, supervisory and non-supervisory employees, and the store remained open. Grange agreed to recognize the Union, and has in fact entered into a collective-bargaining agreement with the Union, covering the bargaining unit certified by the Board.

Respondent and Grange executed several documents with respect to the sale of the three stores in June and July 2000. In these documents Respondent agreed that for a period of 1 year from the date of the agreement (July 17, 2000), it would not own or operate a retail natural foods grocery store within a 2-mile radius of the Norwalk store. It was further agreed in an amendment to the purchase agreement as follows:

The parties acknowledge that Buyer desires the continued operations of each of the Stores in the ordinary course after the Closing. In order to ensure continuity of staff, Seller shall not hire any persons employed at the Stores by Buyer as of each Closing for a period of six months from the Closings without prior consent of Buyer. . . .

Notwithstanding the explicit language of the non-competition agreement, Respondent decided to open a store in Westport, Connecticut, to be located in a plaza about 200 feet away from the Food For Thought store. Respondent had been engaged in construction of the site while it still owned Food For Thought. After the Union victory in April 2000, construction

stopped at this site, but resumed again in November 2000, with a goal of opening in mid-March 2001.

Respondent began to staff this new store in early February 2001, with a priority of hiring 170 employees by the stores' contemplated mid-March opening, in a tight labor market. According to records submitted by Respondent attached to its position paper submitted to the Region, the first non-supervisory employee hired by Respondent was hired on February 8, 2001, with the bulk of such employees, being hired in late February or early March.

Respondent's hiring at the store was effectuated by Lindsay Perry, its regional resource manager, along with Dave Bernier and Scott Reed, its store director and assistant store director respectively. It is undisputed that these officials based on instructions to Perry from Peter Williams, Respondent's vice president of human resources, did not consider current Food For Thought employees for employment at the Westport store.

The complaint alleges that Respondent refused to hire or consider for hire Julius Laloi, Libya Silveira, Rosette Louis, Beverly Hammons, Rajshree Parikh, Steven Clark, Teresa Monteleone, and Maria Sandalo. Respondent's answer admits that it did not hire or consider hiring Silveira, Louis, Clark, Monteleone, and Sandalo. All of the discriminatees were former employees of Respondent at Food For Thought, each were eligible voters in the election, and were employees when Grange took over operation of the store on August 7, 2000. There is no question, and Respondent does not dispute that all of the discriminatees possessed the qualifications for employment with Respondent at its Westport store.

Silveira and Louis applied for employment with Respondent together on February 15. As noted above, both Silveira and Louis testified as witnesses for General Counsel in the trial before Judge Marcionese in February 2001. They had seen a sign in front of the store requesting individuals to apply for employment. When Silveira and Louis applied, Scott Reed gave them applications to fill out, which they did at the time. Reed asked if they were working next door for Food For Thought. They replied, yes. After completing the applications, they gave the applications to Reed, who told them, "we[']ll get back to you." Both of these witnesses testified that their applications confirmed that they were seeking full-time positions for Respondent. They both conceded that they were at the time working full-time jobs for Food For Thought, but that they intended to work two full-time jobs if necessary. Silveira added that she had been told that the Food For Thought store was going to close and she did not want to lose her job.

Beverly Hammons⁹ and Rajshree Parikh attempted to apply for a job with Respondent on February 14. They both went over to apply at Respondent during their break from their jobs at Food For Thought. They had heard from other Food For Thought employees that Respondent would not hire any Food For Thought employees, but decided to apply anyway.

⁹ The record reveals that Hammons was alleged in Case 34-CA-9278 to have been discriminatorily transferred from the natural living department to a position of cashier. This allegation was settled a few days before the trial began in February 2001.

When Hammons and Parikh arrived at Respondent's store, they were given applications to fill out by Lindsay Perry. While they were filling out the applications, Hammons and Perry discussed benefits and part-time employment. At that point, Hammons asked if it made any difference that they worked for Food For Thought. Perry replied that it does make a difference, and added that Respondent would take their applications, but put them in a separate file. Perry stated that she did not know if the individuals would be hired, but she could not talk further with them about job openings. Hammons asked why does working for Food For Thought make a difference, and Perry answered, "It's very complicated and I can't go into it right now." Since their break at Food For Thought was nearly over, they asked if they could take the applications with them, fill them out at home and bring them back. Perry replied no, they were not allowed to take the applications outside the door. However, Perry added that she would be back at the store on Saturday, and they could come back then to fill out the applications. Both Hammons and Parikh left without finishing their applications. Neither of them returned on Saturday, or any other day to fill out an application or otherwise attempt to apply for a job with Respondent.¹⁰

Laloi testified that he attempted to apply for a job at Respondent on February 6 at 3 p.m. He asserts that he saw an individual whom he identified as Rob, who had been employed as supervisor by Food For Thought. Rob was wearing a tag that said management recruiter.¹¹ Laloi had already been given an application to fill out from another man, when Rob saw him. Rob who recognized Laloi from Food For Thought, said to Laloi that he could not apply for a job with Respondent, because he worked at Food For Thought. When Laloi questioned Rob about that statement, Rob replied, "let me ask my boss." Laloi then testified that he heard Rob speak to a woman named Lindsay, and asked Lindsay "if people from Food For Thought can fill out applications?" Lindsay replied: according to Laloi, "no," and Rob said to Laloi "sorry, its not my fault." Laloi testified that he left without filling out an application.

Perry furnished no testimony about this incident, and did not specifically deny Laloi's testimony. However, Perry did testify that everyone who applied received an application, including individuals who appeared to be drunk. O'Neil did not testify.

Kristin Coppola also a Food For Thought employee testified that her application confirmed that she applied for a job with Respondent on January 23. She was given an application to fill out by Perry and filled it out. However, after telling Perry that she worked at Food For Thought, Perry informed Coppola that she could fill out the application now and Respondent would keep it on file. However, "due to the agreements that Wild Oats has with Food For Thought we can't hire any employees

of theirs at this time, but we will keep it on file in case you want to come apply in the future." Thus, she filled out the application and left.

Coppola further asserts that after she quit her job at Food For Thought in mid-February, she contacted Respondent and spoke to Bernier. She told him that she had filled out an application in January, and asked to come for an interview. Bernier agreed and an interview was arranged for mid-March.

At the interview, Bernier reviewed the application and her experience and then asked Coppola if she was still employed by Food For Thought. She said, "no," and Bernier then offered her a job.

When Respondent opened its store for business on March 15, the Union began picketing outside the store. Rosemary Reder was hired by Respondent as the natural living department manager. After the picketing began, Reder asked Jennifer Griffin who was at the time, Respondent's assistant department manager, "what is going on?" Griffin replied, "that is the union out there. We are against the union. Dave Bernier specifically does not like the union and if anyone asks questions about the union, have them talk to Dave." On another occasion, Griffin told Reder that people from Food For Thought were not hired by Respondent, because they were union people. Griffin added that union people were not coming into the store because they would start something going. Reder then asked Griffin "why is Kristin (Coppola) here?" The record does not reflect Griffin's answer.¹²

After this conversation, Reder asked Coppola how she had gotten hired since she was from Food For Thought and that she (Reder) had heard that Respondent was not hiring Food For Thought people, Coppola replied that Respondent hired her because she voted against the Union and was against the Union.

Reder further testified that in early April, she was sitting in the department manager's office with Adam Schwartz, grocery manager, and Marshall Lovell, food service manager, Reed and Bernier. She asserts that either Bernier or Reed said that Respondent did not want "moles" in the store, and "that they did not want moles from Food For Thought to come over to our store and start up union proceedings." She claims that she then asked Schwartz "what is a mole?" He replied, "that a mole is somebody for the Food For Thought who would get people to join the union and that Respondent should look out for people who were moles."¹³

All of the management representatives allegedly present, essentially denied Reder's testimony about the conversation concerning moles. However, Reed admitted that he knew that a "mole" is someone who will come in and try to organize the store on behalf of the Union.

¹⁰ The above findings concerning the interaction between Hammons, Parikh, and Perry is based on a compilation of the credited testimony of Parikh and Hammons. Perry although testifying about other matters, did not testify about this incident, other than to testify that Respondent's policy is not to allow applications to be taken away from Respondent's premises.

¹¹ The complaint in Case 34-CA-9586 herein alleges and Respondent's answer admits, that Rob O'Neil is Respondent's regional produce director.

¹² The above findings are based on the credited testimony of Reder. Griffin did not deny most of Reder's testimony, and denied only that she ever told Reder what Bernier thought about the union. She did not deny telling Reder that people from Food For Thought were not hired because they were union people.

¹³ On subsequent examination, Reder was not certain which management official made the initial statement about moles or which one responded to her question about moles.

I shall credit Reder's testimony with regard to these comments made by representatives of Respondent concerning "moles" and Respondent's aversion to having such people in the store. I am cognizant of the fact that Reder was uncertain as to which management representative made the initial comment to her about moles, and which one answered her question about what moles are. However, I nonetheless find her testimony credible, because such testimony is not likely to have been made up or fabricated and it has "the ring of truth" to it. In my view, the uncertainty expressed by Reder as to which management representatives made the statements to her, does not sufficiently detract from her credibility, and in some ways adds to it. Thus, if Reder was simply making up these conversations, as Respondent appears to contend, she would likely have been more certain as to who made the offending statements. I believe that it is reasonable that where four management representatives were present, Reder might not be certain as to which one said what, but could be sure as to what was said to her. I therefore conclude that one of the management representatives present made the statements to her as she testified.

Respondent called Williams, Bernier, Perry, and Reed to testify concerning Respondent's decision not to hire Food For Thought employees, and its hiring procedures for the new store. In that regard, Perry was in direct charge of the staffing, and along with Bernier and Reed recruited, interviewed, and hired the staff. They placed ads in local newspapers, on the internet, and held a job fair at the store. Perry and Reed testified that they also recruited employees from local grocery stores, which involved visiting stores, observing employees and offering promising employees the opportunity to apply. Additionally, Reed was formerly employed at Shaw's Supermarket, so he testified that he contacted some employees whom he knew and tried to persuade them to fill out an application for Respondent. Perry and Reed recruited at several other stores in addition to Shaw's, such as Grand Union and Shop and Stop. According to Bernier, who at one time worked at all of these stores, the employees there are represented by Local 371. Bernier further testified that as a result of the above-described recruitment process, Respondent hired 20–25 employees from these three union stores.¹⁴

Admittedly, Respondent did not recruit at Food For Thought as Perry testified that she was informed by Williams by phone in late December 2000, that she was not to hire currently employed people from Food For Thought. According to Perry, Williams did not give her reason for this instruction at the time, and made no mention of the no-raid agreement.

Perry further asserts that sometime in late January 2001, she had another conversation with Williams. She states that she informed Williams that she was having some trouble staffing the store, due to low unemployment and the difficulty of attracting hourly employees. She added that Respondent was spending a lot of money advertising and would have to turn up

¹⁴ However, neither Bernier, Perry, nor Reed provided any names of any of the employees hired from these stores. Moreover, Respondent did not introduce any job applications or any other documentary evidence to establish that it hired 20–25 employees from these unionized stores.

the heat. At some point during this conversation, Perry claims that Williams informed her that when Food For Thought was sold, there was a "no raid clause" in the contract, that prohibited Respondent from hiring Food For Thought employees. Both Bernier and Reed were informed by Perry that they could not hire current or active Food For Thought employees, but were not told the reason for this decision. Neither Bernier, Perry, nor Reed were told anything about a 6-month limitation in the contract for the hiring of Food For Thought employees.

In carrying out these instructions from Williams, the management representatives testified that they accepted applications from everyone who came in to apply, but placed all application from current employees of Food For Thought in a "no" pile, along with other rejected applications, someone who came in to apply while intoxicated. This procedure was also followed with respect to current managers or supervisors from Food For Thought. Respondent kept all the applications on file, and if an employee left Food For Thought, they could be hired. In that regard, Bernier testified that Coppola was hired in March, after she quit Food For Thought, and contacted Respondent. Her original application was utilized and she was hired.

Respondent's primary witness with respect to the decision not to hire Food For Thought employees was Williams, whose testimony is for the most part consistent with that of Perry. He asserts that he was not involved in Respondent's decision to open the store in apparent contravention of the agreement, but was informed by Respondent's general counsel, Freya Brier, in late November 2000, that the store would be opening and would need to be staffed, which would be Williams' responsibility at that time. According to Williams, Brier showed him a copy of the purchase agreement, which included the noncompetition and the no-hire clauses. Williams asserts that Brier informed him that because of the no-hire agreement, Respondent was not allowed to hire current management or hourly employees from Food For Thought employees. In any event, Williams although admitting that he noticed the no-raid clause had a 6-month limitation, asserts that this subject was not discussed with or mentioned by Brier in the late November conversation. Williams further testified that sometime in December, he telephoned Perry and informed her that Respondent was planning to open the Westport store, and due to a contractual agreement, Respondent was not allowed to hire any active or current Food For Thought employees.¹⁵

In any event, Williams although admitting that he noticed the no-raid clause had a 6-month limitation, asserts that this subject was not discussed with or mentioned by Brier in their late November conversation. Williams further testified that sometime in December, he telephoned Perry and informed her that Respondent was planning to open the Westport store, and due to a

¹⁵ This testimony was elicited on questioning from me. In prior cross-examination, he testified that he merely interpreted the agreement to mean that Respondent could not hire current Food For Thought employees, but that Brier did not discuss this issue with him.

contractual agreement, Respondent was not allowed to hire any active or current Food For Thought employees.¹⁶

Williams testified further that sometime in January 2001, he was informed by Brier of a conversation between Brier and Gordon Clapp, the chief executive of Grange, the purchaser of the Food For Thought store. His testimony with respect to this conversation changed somewhat during the course of his testimony. On direct examination, Williams testified that Brier informed him that Grange was intending to sue Respondent for violation of the noncompete clause, and that in connection with her discussion with Clapp about the suit, she reached a verbal agreement with him to extend and continue the no-hiring agreement.

On cross-examination, Williams testified that during this conversation, Brier told him that Respondent was probably in violation of the noncompete agreement by opening the store, and that Clapp was “pissed” about such an action. Williams then backtracked from his earlier testimony that he was told of an “agreement” to extend the no-hiring clause between Clapp and Brier, and asserted that he “imagined” that there was such an agreement, since Brier directed him to continue the no-hire clause, and that subsequently (after March 16) he received a letter confirming such an agreement.

Upon examination by me, Williams testified further about the conversation with Brier in January 2001. He asserted that Brier told him that Clapp was “pissed” about Respondent opening the store, and was going to sue Respondent for violation of the noncompete agreement, and that Respondent needed to continue not to hire any Food For Thought employees. According to Williams, there was no discussion about a 6-month limitation of the no-hire agreement, or about an extension of such agreement. He conceded that he was aware of the 6-month limitation, and knew it could be a problem or an issue, but asserts that he did not discuss it with Brier. He also admits that Brier’s instructions to him in January 2001, was essentially the same as it was in November 2000, i.e., do not hire current Food For Thought employees. Williams adds that he didn’t recall if he called Perry in January to reiterate this instruction, since this instruction to her was the same as it had been before, and did not change.¹⁷

According to Williams, he received no further word about any agreement to extend the no-hire agreement until after March 16, when Brier handed him a copy of a letter from Clapp to Brier dated March 16, allegedly documenting a “recent” conversation between Clapp and Brier. The letter reads as follows:

Freya Brier
Wild Oats
3375 Mitchell Lane
Boulder, CO 80302

¹⁶ As noted above, although Perry recalls the conversation with Williams and the instruction not to hire current Food For Thought employees, she asserts that Williams did not mention any contractual or no-hire agreement at that time.

¹⁷ As noted, Perry asserted that Williams did call her in January, and for the first time told her that she should not hire current Food For Thought employees because of the no-hire agreement with Grange.

March 16, 2001

Dear Freya,

It is my understanding from our recent phone conversation that Wild Oats will honor its commitment to not hire any of our Food For Thought staff members in an effort to try to settle the breach of our non compete (and implied no hire) agreement. As I indicated to you I feel that by hiring our staff members Wild Oats is just exacerbating the amount of damages caused by your breach of the non compete.

Please call me if this is not your understanding of our conversation at 720-890-1555.

Sincerely,

Mark R. Clapp

There is no dispute that by March 16, Respondent had hired substantially all of its staff for the Westport store. The record also revealed that on February 16, 2001, Grange filed an Application for a Preliminary Injunction in the District Court of Connecticut, alleging that the opening of the Westport store by Respondent is in violation of the noncompetition agreement, and that the court enter an injunction enjoining Respondent from opening and operating a store within a 2-mile radius of Grange’s store in Norwalk. The record does not reflect the disposition of this action, other than that Respondent opened the Westport store on March 15 as scheduled and has continued to operate the store ever since. Brier did not testify on behalf of Respondent, and Respondent did not assert that she was unavailable or provide any explanation for why it did not call her as a witness.

Respondent also did not call Gilliland as a witness, or any other official or representative to testify about its decision to open the store in Westport, notwithstanding the noncompete clause, or why it decided to comply with the no-hire clause in the agreement instead.

B. The Termination of Diane Lane

As related above, Respondent opened its Westport store for business on March 15. On that day the Union began to picket in front of Respondent’s store, with signs urging customers not to shop at Wild Oats and that Wild Oats was unfair.¹⁸

Diane Lane was hired by Respondent on April 12 as a full-time clerk in the natural living department. Her job consisted of helping customers pick out vitamins, selling them vitamins, and stocking shelves. Initially she worked 40 hours per week for Respondent, primarily in the afternoons. Her supervisors were Reder and Griffin.

On April 28, Reder informed Lane that due to financial problems in the department, her hours were being cut to 25. This decision upset Lane, so she decided to send a letter to Respondent’s CEO Gilliland and his wife (also an official of Respondent) Libby Cook. She had noted in the employee manual an indication that Gilliland and Cook would be accessible to direct

¹⁸ The Union had filed its first charge in this proceeding on February 15.

communication from employees.¹⁹ In the letter, Lane complained about her hours being reduced, as well as her dissatisfaction with Respondent's inventory system, and her suggestions for improvements. She also asked if there were other departments where she could pick up the extra 15 hours.

In early May, Lane was approached by Perry, who had received a copy of the letter from Respondent's corporate office. Perry informed Lane that she wished to meet with Lane to discuss the letter, and asked Lane to e-mail Perry her schedule. Lane complied with this request on or about May 4. However, the meeting between Perry and Lane never took place.

On April 30, a customer came into the store. Lane approached him and asked if he needed some help. The Union was still picketing outside and the customer asked her "what was going on?" Lane replied: "that she has her own issues with the Respondent, but the Union was picketing and 'I might join them.'" The customer asked what her issues were. Lane answered: "that she had some employment related issues that she was trying to work through, and the place was a mess." The customer added that she should talk to the Union. Lane responded: "that or get a lawyer." The customer then left without making a purchase or needing any help.²⁰

During the next week, Griffin testified that she informed both Reed and Bernier about the conversation between Lane and the customer that she overheard. Her version of the conversation was that Lane informed the customer that the store was disorganized and a mess, and that the customer then asked what was going on with the Union? Lane replied: "that the Union was picketing Respondent" and "I might join them." According to Griffin, she considered that Lane was "bad mouthing" the store in this conversation, and that she reported it to Reed and Bernier from "start to finish." Griffin did not testify what if anything Bernier or Reed responded to her at that time.

On or about May 1, Griffin called Reder at home on her cell phone. Griffin seemed very excited. She informed Reder, "we finally have a way to get rid of Diane Lane."²¹ She was talking to the Union head." Reder replied: "oh really." Griffin then stated, "wait until Dave (Bernier) hears this, he is going to blow his top." The next day, Reder came into the store, and told both Cota and Reed what Griffin had reported to her about Lane speaking to the Union. Cota instructed Reder to make up a list of all the problems with Reder so they could give it to Dave when he comes back.²²

Reder complied with this instruction, and made up a list detailing problems with Lane's performance. The list includes comments that employees have complained about Lane's

¹⁹ The manual states that "we have an open communication policy and encourage you to express your needs and ideas to us and your managers."

²⁰ The above description of this conversation is based on a compilation of the credible portions of the testimony of Lane and Jennifer Griffin, who admitted that she overheard the discussion between Lane and the customer.

²¹ Griffin had previously made complaints to Reder about problems with Lane, such as Lane bossing other employees around and making complaints about the department.

²² Bernier was out on vacation or sick at the time.

bossiness, being rude to customers, and complaining about the store and management. It reflects that Barbara (Concierge) informed Reder that Lane had mishandled a guest which caused the guest to leave furious, as well as references to Lane's lateness on April 21, 27, and 30. The list also contains the following remark, "Jennifer told me the other night Diane had told her she had been talking to the head of the Union." Reder then gave the list either to Bernier or to Perry. Reder informed Perry that Lane had been talking to the Union and probably had been causing problems. Perry replied that Lane had already contacted her, and she was going to speak to Lane. Reder was also informed that Reed had instructed Barbara Amodio, concierge, to prepare a memo about her complaints about Lane. Amodio gave Reder a copy of a memo that she prepared, dated May 2 to Reed. The memo details her complaints about Lane, more specifically Lane's constant complaints about management and how the department was being run.²³

On May 8, which was Bernier's first day back to work after his vacation, Lane was summoned to Bernier's office. Present was Bernier, Reder, Reed, and Griffin. Bernier began the conversation by stating that he understood that Lane was not happy at work and had written to the president of the company. He asked, "why she had done that?" Lane replied: "that she had read the employees manual and tried to speak to other managers, but her hours were cut, and the manual stated that if she had a problem, the CEO wanted to know about it, so she wrote to them." Bernier exclaimed, "that is unacceptable," and criticized Lane for not following the chain of command. He explained to her that the chain of command requires her to talk to Griffin then Reder, then Reed, then to Bernier, and if Bernier is not there, to Jim Ware. Lane responded "that she was unaware that there was a chain of command, and added that she had spoken to other managers about her problems and they would not listen.

Bernier then informed Lane that Respondent had received customer complaints about her. Lane replied that she had no knowledge of such complaints, and that she got along well with her co-workers."

Bernier then informed Lane that "I've heard that you've been talking to the Union and that you've joined the Union?" Lane responded that Bernier's allegations were "bizarre" and sheer fabrication, and denied that she spoke to anyone from the Union, or joined the Union. Griffin then spoke up and said, "I heard you, I was standing right there when you were talking to a customer about the Union." Lane responded that she wasn't talking to the customer about the Union, but the customer was asking some questions, and she told him that she was having problems with the store. Bernier commented that he had heard that she had been talking to the head of the Union, had joined the Union, and asked why she had done that? Lane repeated

²³ Although Reed denies ever asking Amodio to prepare such a memo or ever seeing it, I do not credit his testimony in this regard. I credit Reder's testimony that Amodio gave her a copy of the memo that she submitted to Reed. I note that Respondent did call Amodio to deny that she prepared the memo to Reed which appears authentic on its face.

that she hadn't joined the Union and that she did not want to lose her job.

Bernier concluded the conversation by stating that since she had been talking to the Union "maybe we should just part ways here," and "this is your last day." He then asked Reder and Lane to escort Lane to her locker and to the door.²⁴

Bernier testified that he made the decision to discharge Lane because of the numerous complaints that he had received about Lane's performance, more specifically about poor customer service, her inability to get along with other employees and supervisors as well as her very short length of service. The termination form that Bernier prepared indicated that Lane was terminated for unsatisfactory performance, and that she had shown "a bad attitude and poor customer service to both customers and staff members. She has shown complete disregard for management directives." Bernier asserts that he received complaints about Lane from her supervisors, Reder and Griffin, as well as a complaint from Jim Ware (Bernier's supervisor) and from Barbara Amodio, the concierge.

As for Reder, Bernier contends that Reder in addition to making specific complaints to Bernier about Lane, stated to Bernier on more than one occasion that she couldn't work with Lane and that Lane had no potential. He added that Reder said that to him on the day before the discharge, and that on the day of the termination, he called Reder and Griffin into the office before calling in Lane, informed them of his discharge decision and that Reder replied "I agree." He also testified that Reder on that day repeated her statement that she can't work with Lane, and that Bernier told her, "we're going to let her go today."

Reder unequivocally denied that she ever told Bernier that she couldn't work with Lane or that she ever had any discussion with Bernier about Lane's discharge. I credit Reder's testimony in this regard, as I found her to be a more credible witness than Bernier, who as noted above was contradicted in several areas by Griffin, Respondent's own witness. Indeed, even as to this issue, Griffin's testimony was not consistent with Bernier. Thus, according to Griffin, Bernier called Reder and Griffin into his office before Lane was summoned. He merely informed them of his decision to terminate Lane. Griffin asserts that Bernier did not ask either Griffin or Reder their opinion or further input concerning this decision. Significantly, and again contrary to Bernier's testimony, Griffin states that neither she nor Reder said anything about Bernier's decision to terminate Lane. Thus, based on the above, I do not credit Bernier's testimony, that Reder said that she couldn't work with Lane or that she agreed with his discharge decision.

²⁴ My findings with respect to the events of this meeting is based on a compilation of the credible portions of the testimony of Reder and Lane which are essentially consistent in most respects. I do not credit the testimony of Griffin and Bernier that the subject of the Union was not even mentioned during the meeting. I note however, that although Griffin corroborated Bernier on this point, she contradicted Bernier's testimony as to his knowledge of the fact that the Union was discussed by Lane and the customer in the conversation that Griffin overheard and that Griffin reported this fact to Bernier. Additionally, Griffin contradicted Bernier as to his denial that the chain of command was mentioned during the meeting. Thus, Bernier's testimony is inconsistent with that of Griffin in two significant areas.

However, Reder conceded, and the record discloses that Reder was not satisfied with Lane's performance, and had received several complaints about Lane from other employees, from Griffin and from Amodio, and relayed at least some of these complaints to Bernier. Indeed, as noted above, and as pointed out by Respondent in its brief, the memo that Reder prepared at the request of Respondent, detailed a number of complaints about Lane's performance, including rudeness to customers, bossiness, and Lane's propensity to criticize management. Reder also conceded that she was upset with Lane for her criticism of management, and she spoke to Lane about some of her criticisms and told her that "we already have this policy." However Lane would insist that, "we need to make changes," and Reder would reply that "we are working on it," and adds that she was trying to be diplomatic. Reder also conceded that she reported to Reed and or Cota of complaints made by Griffin and others about Lane, that Lane was bossing people around and the employees didn't like it. However, neither Reed nor Cota made any reply to her nor asked her to do anything about these problems, until after the Union conversation overheard by Griffin, when Cota asked her for a list of Lane's problems. Reder asserts that she did not see the problems with Lane as "real serious," or "pressing," and that she had planned on having a staff meeting to go over some of these issues.

Griffin confirmed that she had witnessed or been told about several instances of problems with Lane's performance, including rudeness to customers, badmouthing the company, and that she passed on these complaints to Reder, Bernier, and Reed.

Jim Ware, Respondent's Regional Director testified to an incident that he observed and reported to Bernier. He observed Lane working in the aisle, while there were customers not being approached. He asked Lane to walk around and interact with customers. He didn't recall what Lane said or even if she complied with his instructions, although he assumed that she did. However, an hour later, he again observed Lane working in one aisle, while customers were not being attended to. He said to Lane that she should please interact with customers, and reminded her that he had asked Lane to do that before. Once more Lane did not respond to Ware, but he didn't recall if she complied with instructions, but testified that "she probably did." Later on that day he reported to Bernier that an employee who he pointed to Bernier was not helping customers. Bernier replied, "that the employee was new and he would "take care of it."

Bernier, as well as several other of Respondent's witnesses, admitted that Respondent utilizes a progressive disciplinary policy, which is meant to correct employee behavior, and that generally verbal and written warnings are documented and are part of the progressive disciplinary system. It is undisputed that no such documented verbal or written warnings appeared in Lane's file.

Bernier on his direct testimony attempted to explain why he did not utilize Respondent's progressive disciplinary system of verbal or written warnings before discharging Lane. He responded, "She was in her first week with us. We saw a pattern developing. You know, I like to give people the benefit of the doubt and see if things, possibly will pan out. On the third

week—I had already been up to my ears in complaints. I decided that it would be best that we went on separate ways.”

On cross-examination, Bernier was asked why he didn't ask supervisors who allegedly made oral complaints to him about Lane, whether they had documented the warnings. He replied, “I had a grand opening going on. I was extremely busy and I avoided it.”

The General Counsel introduced a number of written warnings, suspensions, and other disciplinary documents that Respondent has issued to various employees, reflecting Respondent's use of the progressive disciplinary procedures concerning various types of conduct, such as attendance, lateness, shortages, rudeness to customers and other employees, insubordination, profanity to work supervisors, and other violations of Respondent's rules.

One example is employee Greg Bayliss, who was hired by Respondent on March 14. On May 10, he was issued a written warning for insubordination and failure to follow rules, wherein he was warned of his “lackadaisical attitude” will not be tolerated, and that he must do what his supervisors asked, and if not “it will be documented and could lead to termination.”

On June 24, Bayliss was given another written warning for lateness and poor performance, and again warned that further violations will result in further documentation up to termination. On June 27, 2001, he received a third written warning, for lateness, where he was warned that further violations will result in termination. Bayliss was never terminated, but resigned on July 2.

On May 24, Gloria Canceli, a cashier received a written warning for violation of company rules (abandonment). The warning reflects that she informed her supervisor that she had two altercations with guests and that she could no longer work that night and was leaving. She had no permission to leave. Her file also included a copy of a complaint filed by a customer, which was dated March 23, that apparently reflected one of the confrontations that Canceli had with a guest. The complaint indicated that Canceli rang up products wrong, and that the customer pointed this out to her, as well as asking Canceli not to put can products in with bananas. Canceli then walked away from the counter, forcing the customer to bag the rest of the order. The customer observed, “I have never been served like this.” Nevertheless, Canceli was not terminated at the time, but given a written warning reflecting that further violations will result in termination. She was terminated on May 27, when she called out at the 10 p.m. shift.

Also, employee William Hampton received these written warnings for attendance problems from May 23 to June 25. He was finally terminated on June 28 with the statement that he was written up three times for attendance violations.

Further, Jennifer Bowles was issued a written warning on June 14 and 15 for shortages in cash, and these warnings reflected Bowles will be spoken to and further violations will result in termination. She also received a verbal warning, but documented in writing on June 14 for four instances of no show or lateness between June 4 and June 14.

In June, Bowles was working in the natural living department. A written warning was issued to her by Griffin and signed by Reed as well on June 25. This warning reflects that

on June 21, Bowles called in 2 minutes before her shift started, and there was no coverage until Griffin herself arrived at 9:30 a.m. The warning reflects that Bowles had been written up and verbally warned about excessive lateness and no shows, and the most recent incident will result in suspensions leading to possible termination.

Also on June 25, Bowles received another written warning concerning her conduct on June 24 of failing to show up or call. The memo reflects once again that Bowles had been written up for no-call/no-show previously as well as excessive absences, and that she was advised that if this happens again she will be suspended leading to possible termination. Bowles resigned on August 22 to move to Massachusetts.

The record also reflects that Respondent hired Anita Gilmore on April 5. On April 24, she received a verbal counseling from her manager which was documented in writing, for failure to complete demo reports and failure to clean up before leaving. The memo reflects that this was the second time she was spoken to about the matter. On May 2, Gilmore received another verbal counseling, which was documented on May 3. The memo reflects that the manager warned her about incomplete memo reports and talking to her cousin. The manager informed Gilmore that this was the last verbal counsel warning she would receive, and next time, it would be a written warning which could lead to a termination.

Nonetheless, on May 6, Gilmore called in sick, 20 minutes before the shift began, although Respondent requires calls 1 hour before start time. She was given another verbal warning on May 10, which also included a complaint about incomplete demo reports “even though she had two verbal counseling sessions on April 24 and May 3.” The form made no reference to what action would be taken for future violations. On June 18, Respondent issued Gilmore a written warning, reflecting that on June 17, she got upset with a fellow worker and began to “raise her voice to a level that was completely inappropriate to the sales floor.” This warning, signed by Reed, indicates that further violations will result in termination.

Nonetheless, her file reflects another memo dated June 20, from the manager which apparently did not result in a written warning, which details that Gilmore was again late in turning in demo reports on June 16–18, and that she promised to complete the reports and hand them in by June 20. However, she did not hand in the reports to the manager as promised on June 20, and the manager observed in the memo, “it seems she will do only what she wants to do when she wants to do it without regard to her job responsibilities.” On June 27, the same manager again wrote a memo detailing another counseling session with Gilmore on June 26, wherein he spoke to her about being late, leaving early, and the failure to properly complete demo reports. The memo reflects that Gilmore became upset and raised her voice to the manager, which convinced him that further discussion was futile.

Still, no disciplinary action was taken against Gilmore. Finally, on July 12, the manager approached Reed in regards to Gilmore not following through with assigned tasks. Gilmore was called into Reed's office along with the manager. After Reed raised the manager's concerns with Gilmore, she raised her voice and began to yell. Reed cautioned her to lower her

voice as they were talking. Reed raised the issue of Gilmore speaking to associates throughout the store about employees and management in a negative way. Reed told Gilmore that associates had approached him and told him they were uncomfortable with some derogatory comments that she made towards them. Gilmore denied the accusations, and Reed said she was not telling the truth. Gilmore accused Reed of calling her a liar and stormed out of the office. She returned a minute later and said she was “quitting.”

Respondent hired Toya Diaz on April 15. On April 26, she received a verbal warning, documented and signed by her, which reflects that she was late by an hour for the second time in a week, without a phone call. The form indicates that further violations will result in suspension. On May 17, she received a written warning for no-call, no-show, and excessive lateness, and was warned that further violations will result in termination. Nonetheless, on June 22, Diaz was 6 hours and 45 minutes late and did not call. She received only another written warning. On June 28, Diaz punched out without authorization or speaking to anyone. She again received a written warning for this conduct signed by Reed.

On September 20, Margaret Krynick was issued a warning “for speaking to co-workers in an unbecoming behavior that is unacceptable to company policy. She yelled and caused a scene that disrupted the departments work progress.” This form reflects that further violations will result in suspensions pending termination.

Finally, Monehm Pierre received no disciplinary action for failing to be “proactive in customer relations,” and for “letting the customer make the first contact,” but the matter was dealt with by the manager in Pierre’s performance appraisal.

C. The Reduction of Hours of Rosemary Reder

On August 15, the Region issued a complaint in Case 34-CA-9586, alleging that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider and hire any employee employed by Food For Thought, and refusing to consider and hire eight individuals because said individuals joined and assisted the Union. The complaint also alleged that Respondent violated Section 8(a)(1) of the Act, by the actions of Bernier on March 13, of implementing a rule prohibiting employees from engaging in union or concerted activities in nonwork areas on nonworktimes and threatened employees with discharge if they engaged in union or other protected concerted activities in nonwork areas on nonworktime.

On August 23 the “Westport Minuteman,” a local newspaper, printed an article entitled “Union charges Wild Oats with unfair labor practices.” The article referred to the complaint issued by the National Labor Relations Board, as detailed above, and quoted the Acting Regional Director of the Region asserting that the Agency had determined that Bernier had issued an illegal antiunion rule and had ordered workers not to engage in union-related activities during breaks, or in places where store work was not covered. Additionally, the Acting Regional Director reading from the complaint said that Bernier had “threatened employees with discharge if they engaged in Union or other protected activities.” The article further reflects that Bernier could not be reached for comment.

The article also detailed the refusal to hire allegations, and included information about the previous complaint issued by the Board, which at the time had not been decided by the administrative law judge. Finally, the article included various quotes from Brian Petronella the president of the Union, including accusations about Respondent’s antiunion sentiments, such as an allegation that “the store manager, when the store was opened up, told the people at a meeting, anyone here goes out, and talks to those Union people picketing, will be fired.”

On August 24, the Westport News, another local paper published a similar article, which details the allegations of the complaint, as well as several comments from Petronella, including an accusation that employees were told when union employees had a picket line in front of Respondent, that if anyone talked to “any of the union people, they would be fired.”

The Union subsequently prepared a flyer which it distributed to customers while it continued to picket in front of Respondent’s premises. The flyer mentions the “Westport News” article of August 24, and the Union chose its own headline: “Wild Oats Attempts to pull a fast one on Workers.” The flyer states that the acting director of the National Labor Relations Board issued a complaint on August 25 against Respondent, alleging that its supervisors have threatened employees with discharge if they engaged in union or protected concerted activities in nonwork areas on nonworktime, and that Respondent refused employment to eight named individuals. The flyer urges consumers to call or write the CEO of Respondent to let him know that he should hire these workers and respect their right to join a Union without threats of discharge, and that until Respondent hires these employees, you will not shop at Respondent’s Westport store.

Rosemary Reder, who as detailed above was Respondent’s natural living department manager when first hired, voluntarily stepped down as manager in June. She then became a natural living department clerk, and Griffin who had been Reder’s assistant manager, became the manager. At that time, Coppola replaced Griffin as assistant manager. When Reder stepped down as manager and became a clerk, she requested of Griffin that she work 30 hours. However, Griffin initially assigned her only 22 or 22.5 hours for the first month. For the first week of July, Reder received 14.5 hours, but it was then back to 22.5 for the next 2 weeks. For the week of July 15 to 22, she received 20 hours, and for the next 2 weeks, she was scheduled for only 16 hours. During this period the schedule was for the most part a set schedule. She worked Monday’s from 1–8, Wednesday’s from 8–5, and Friday’s from 8–4:30 p.m. When her hours were reduced to 16 for the weeks of July 22–29, and August 5 to 11, her Wednesday hours were cut to 11–5 from 8–5, and her Friday hours were changed to 8–12:30 from 8–4:30.

Coppola replaced Griffin as manager in the first week of August, when Griffin was transferred to Colorado. On or about August 10, Reder spoke to Coppola about receiving more hours, and asked for 30 hours. Coppola replied that she would have to check with Reed, but that she would try to accommodate Reder. In fact, Coppola was able to partially accommodate Reder’s request, and for the week beginning August 12 her hours were restored to 22, although they were somewhat different than her prior schedule. They were 12:30–6 on Monday, 8–

1 on Tuesday, 11:30–5 on Wednesday, and 8–1 on Thursday. Her schedule was identical for the next 3 weeks, including the week of August 26 through September 1.

On August 28, Coppola conducted a meeting of the department in her office. Present were Coppola, Reder, and clerks Marianne Wagner and Bridget Steele. During the course of the meeting, while Coppola was discussing department procedures and uniforms, Wagner chimed in that when she worked at Grand Union, the employees had to wear white shirts and bow ties, and added that it was the Union that told them what to wear. Wagner then stated that the union “sucked” and were a bunch of liars. Wagner at that point referred to the newspaper article that accused Bernier of threatening employees that if they talk about the Union they will get fired. Wagner said that this was not true. Reder then responded by asking how Wagner knew it was not true? Wagner answered that Bernier hadn’t said anything like what was in the paper. Reder replied that “I was there when he fired Diane Lane, and Bernier spoke to Lane about talking to the Union, and that he fired her during that conversation.” Thus Reder asserted, “to me that looks like she was fired for talking to the Union.”

Coppola then opined that this was not true. Reder answered, “I am not lying I know what I heard.” Coppola then stated “that the Union is not good, and when she worked at Food For Thought, the Union came in and they cut everyone’s hours.” Coppola added that she had voted against the Union. Reder at that point asked Wagner “why she signed a Union card at Grand Union and worked there for 9 years if the union was so bad?” Wagner responded that the Union forced her to sign a card. Reder commented that if she did not like the Union, she would have found another job and not worked there for 9 years. Wagner became annoyed, and stormed out of the meeting.

Coppola then continued the meeting and added that the Union was not good and Respondent did not want one there, and all they do is just collect dues.

After the meeting ended, Reder went to the front of the store, and saw Coppola talking to the reporter from the “Westport Minuteman.” She was holding a copy of a document entitled “Would you sign a blank check?”²⁵ Reder overheard Coppola tell the reporter that she had only given this paper to one employee. The reporter asked, “if she had given it to anyone else in the store?” Coppola replied, “no, just one person.” When Coppola walked away, Reder approached the reporter and informed him that Coppola had lied to him, since she (Reder) had also received one of these documents. Reder added that she couldn’t talk to the reporter, because if anyone hears her talking to the reporter about the document, she will probably be reprimanded or fired. Reder at that point noticed Wagner waking fast towards Bernier’s office.

Coppola testified that after the meeting, she immediately went into Bernier’s office and informed him about an exchange of words between Wagner and Reder about the newspaper article written about Bernier. At that point, Wagner knocked on

the door. She came in and informed Bernier “her side of the story,” and that the article written about him wasn’t true but that Reder had said it was true. Bernier informed Wagner that she should not be “bringing outside article stuff” into department meetings, and that he would appreciate it, if she would not “bring up any issues regarding anything that has to do with outside the store.”

Reder was then immediately summoned in to Bernier’s office. Coppola was also present, but she said nothing. Bernier began the meeting by criticizing Reder for “defaming” him, and lying about him. He then asked her “why she was talking to a reporter?” Reder replied, “that Coppola had said something to the reporter that was not true and that she wanted him to know the truth.”

Bernier continued to insist that Reder had lied about him in front of other employees. Reder replied, “that she did not say anything that wasn’t true, and if he was talking about Diane Lane, Reder was in the office when you said to her ‘you were talking to the Union. You need to leave. You are basically fired.’” Bernier then asked Reder if she took notes at this meeting. Reder answered, “no.” Bernier replied that “I did and I have a witness.” Reder asserted that Lane was a witness. Bernier then retorted, “why not call her up then?” Reder responded by asking Bernier why he’s so mad just because she spoke about the Union at a meeting. Bernier responded, “you are not supposed to talk about the Union on my time. You talked about it. You defamed me.” Reder repeated that she hadn’t lied about him and that she was telling the truth and she was “sticking up for what I know to be true.”

Bernier then informed Reder that she was suspended for violating Respondent’s policy against defaming a staff member. Reder then asked why she was being suspended when it was Wagner who brought up the subject of the Union and why is she not being suspended? Reder then added that just because people talk about the Union you get rid of them. Reder then repeated that Bernier got rid of Lane because she wanted to talk to the Union or someone overheard her.

At that point, Bernier stated, “maybe you are not suspended,” and “I need to call Lindsay Perry.” He then called Perry and handed the phone to Reder. Perry asked Reder why she was telling lies about Bernier in front of other employees. Reder replied that she did not tell any lies and had only told what she knew had happened. Perry asked Reder what happened. Reder asked to meet with Perry and then agreed to meet Thursday, August 30. Reder asked if she was suspended and Perry replied that she wasn’t suspended. Reder then returned to work.

On Thursday, August 30, Reder met with Perry. Perry apologized for Bernier and informed her that Reder should never have been suspended and assured her that she was not suspended. Perry said that she was there to answer any union questions if Reder had any. Reder responded that she had no questions, but she thought that she should be able to at least find out about the Union. Perry criticized her for calling Bernier a liar in front of other employees. Reder responded that she didn’t need people at meetings saying things that are

²⁵ This document is a photocopy of the union authorization card, with various antiunion comments appearing thereon such as in collective bargaining you could lose what you have now, and how well do you know the people who work for the Union.

not true and that she knew to be true, and added that she was just speaking her mind.²⁶

On September 5, the Union filed a charge in Case 34-CA-9824, alleging that Respondent by Bernier, threatened employee Reder with discharge because she engaged in union or protected activities. The charge was served by FAX (and regular mail) on Respondent on September 10.

As related above, for 3 weeks ending August 26, Reder had a set schedule of 22 hours. On or about August 27, Reder asked Coppola for permission to take a week off from September 2 through 8. Coppola responded that it might be difficult, because someone else was already requesting half of that week off, but she would see what she could do to accommodate Reder. Coppola was able to accommodate Reder and approved her vacation for the week starting September 2. In this regard, on or about August 1, Coppola issued a memo to the department, reflecting that requests for time off are to be submitted 2 weeks in advance, and they are only requests and time off will be granted on a first come first serve basis. Although Coppola testified that she was annoyed that Reder had not followed this procedure, she admits that she did mention to Reder when Reder requested the vacation, that Reder had been in violation of this memo or that she failed to give 2 weeks notice.

Thus, for the week of September 2-8, Reder was listed as off on the schedule. For the next week, September 9 through 15, Reder was scheduled for 21 hours, Monday, 12:30-6, Tuesday, Wednesday, and Thursday, from 8-1 p.m. While she was on vacation, on or about September 7, she called Respondent and asked Mary Roland to leave a message for Coppola that she would not be in on Tuesday and Wednesday, September 11 and 12, and if there was a problem, Coppola should call Reder back. Coppola did not call back.

On Saturday, September 8, Coppola had a conversation with Reder's mother, in the store.²⁷ During this conversation, Reder's mother informed (Reder's mother is also employed by Respondent) Coppola that her daughter has been very busy because "she's trying out a new job."

On Monday, September 10, Reder reported to work and worked her regularly scheduled shift of 12:30 to 6. On that day, Reder apologized to Coppola for not being able to come to work on Tuesday and Wednesday, September 11 and 12. Coppola did not indicate to Reder that her absence on those days created a problem for her, or that Reder should have spo-

ken to a manager directly, rather than leaving a message with Roland about her absence. Reder then referred to the fact that an employee named Kate was leaving, and indicated she would be available for more hours if Respondent needed her. Coppola asked when Reder would be available. Reder asked when Respondent needed her, and she would see if she could arrange her schedule at her other job to accommodate Respondent.²⁸ Coppola informed Reder that she would have to speak to Reed. Coppola later on in the day, handed Reder a "temporary schedule" for the week of September 16 to 22. The schedule provided for 22 hours for Reder, including 4-8 on²⁹ Sunday, 10-2 Monday, 8-1 on Tuesday and Thursday, and 10-2 on Wednesday. After reviewing this proposed schedule, Reder arranged with her other job to cover the hours proposed by Coppola, on Mondays through Thursdays, but did not wish to³⁰ work on Sundays. Therefore, Reder highlighted on the proposed schedule the hours that she could work, and indicated on the schedule that she had changed the schedule at her other job. She left the schedule on Coppola's desk on September 13 when she reported for work.

When Coppola arrived, Reder informed Coppola that she had changed her schedule and could work 4 of the 5 days requested. Coppola replied that Reder's proposed schedule "is not going to work," and she must work all 5 days or none of them. Reder responded that she never works on Sundays and that Coppola knew it. Reder added that Respondent needs someone to work the Monday to Thursday hours, and asked why she couldn't work those days. Coppola answered that she didn't know now, and would let Reder know.

When Reder completed her shift about 1 p.m., she noticed a copy of a new schedule on her desk. This schedule cut Reder's hours to 10. She was assigned hours only on Tuesday and Thursdays from 8-1. Reder immediately confronted Coppola and asked her "what is this? Ten hours. I thought you need somebody all five days, I am willing to work four out of five." Coppola responded, "[T]his is all I need you for right now." Reder complained that Coppola was being unfair, that she (Reder) had given Coppola the hours that she wanted when Reder was manager, and accused Coppola of doing this because she was for the Union. Reder added, "[J]ust because you were not for it, does not mean other people were not for it. Am I not entitled to find out about it?" Reder also asserted that it was Magner who brought up the subject of the Union at the meeting, and again accused Coppola of being unfair. Coppola replied that Reder would have to talk to Scott Reed about the hours.

For the next week, September 23 through 29, Reder was scheduled for 10 hours again, but this time on Wednesdays and Thursday from 8-1. The schedule had not been posted on Thursday, September 20, when Reder worked, so she telephoned Coppola on the weekend and found out that she was again scheduled for 10 hours, but on different days. This upset Reder, since she had arranged her schedule at her other job to

²⁶ My findings with respect to the events of August 28 through 30 is based primarily on the believable testimony of Reder and to the extent that her testimony differs from that of Coppola, Bernier, or Perry in certain areas, for the most part I have credited Reder's version of events. However, I note that the significant aspects of her testimony is not largely in dispute. Thus, even Respondent's witnesses concede that an argument between Magner and Reder occurred at a department meeting concerning the Union and Bernier's alleged threat to terminate union supporters as set forth in a newspaper article. After this meeting, it is also undisputed that she was called into Bernier's office, where he criticized her for "defaming" him, by supporting the allegation in the article, and during the course of an argument between Reder and Bernier over the truth of what Reder heard Bernier say vis-à-vis Lane, Bernier mentioned suspending Reder.

²⁷ Reder's mother is also employed by Respondent.

²⁸ Reder had another part-time job at a company called "Neon," Coppola admitted being aware of this other job.

²⁹ By this time, Reed had replaced Bernier as store manager.

³⁰ Reder had never worked on Sundays before.

accommodate the prior schedule. She phoned Coppola on Monday, September 23. Reder complained to Coppola about her schedule being changed again. Reder asked if these hours were permanent and Coppola replied, “no,” that she would not give Reder set or permanent hours. Reder told Coppola that she knew that Reder had another job and asked why she could not have set hours like everyone else in the department? Coppola replied that she could not give her a set schedule. Reder asserted that since she has another job, she cannot keep switching hours and added that Coppola was “doing this because you want me to quit.” Coppola replied that she could not give Reder a set schedule and that she would put her down on the schedule, “when I need you.”

Scott Reed testified that on or about September 19, employee Allison Trusty complained to him about being pressured to sign a union card in the parking lot by Rosemary Reder. Reed instructed Trusty to prepare a memo of the incident and return it to him. A memo was subsequently typed up by Respondent, based on Trusty’s recounting of the events of September 19, and Trusty signed the document dated September 19. The memo details the fact that Reder urged Trusty to join the union and talked about union benefits and the fact that Respondent could fire or suspend her. Reder added that Trusty should not be afraid to sign a card and she would be around again. The memo also reflected that Reder asked another employee if he signed a card and the employee replied that he had signed already. This memo was placed in Reder’s file.

Another memo in Reder’s file reflected a meeting with Reder, Coppola, and Reed on September 19. According to the memo, as well as testimony of Coppola and Reed, Reder was informed by Reed that several employees had complained to Reed over the past couple of days that Reder was interfering with their worktime. Reed told Reder, “I just want to remind you that work time is for work.” The union was not mentioned during this meeting. According to Reed, several employees had previously complained to him that Reder had been bothering them at or while they were returning from break, and trying to get them to come into the natural living department to talk. Reed asserts that he asked the employees what Reder was “bothering” them about, but they did not want to get into it and did not tell him. Reed further testified that he did not believe that Reder was “bothering” those employees about the Union, and as far as he was concerned, “it didn’t matter to me what she was bothering them about.”

For the week of September 30 to October 6, Reder was scheduled once more for 10 hours but once again on different days (Monday and Thursday), Reder called the week before and Coppola informed her of this schedule, and that it was changed again. Reder replied, “I am tired of your little games Kristin. I need a set schedule.” Reder said, “fine” and hung up. Reder did not show up for work that week.

For the week of October 7 to 13, Reder was assigned 15 hours, Monday and Wednesday, 10–2, and Thursday 8–1. She called Coppola and after being informed of these hours, told Coppola that she was not going to come in unless she had a set schedule.

The record does not reflect Reder’s schedule for the week of October 14 to 20, but Reder did not come into work nor call.

For the week of October 21 to 27, she was assigned 15 hours, Monday and Thursday, 8–1, and Wednesday, 10–2, but didn’t come to work. In fact according to Reder, she never even found out about this schedule, since “as far as I was concerned, I was done.”

At one point in October, Reed spoke to her mother, and was told that Reed had asked her “where is Rosie?” Her mother reported that she replied to Reed, “you know where she is. You people made it so she would not come in anymore.”

By letter dated October 28, Reder stated, “[U]nfortunately because Wild Oats has refused to give me a set schedule and because of the reduction of my hours, I am forced to resign.” Coppola testified on behalf of Respondent, as to the reasons for its decision allegedly made on her own, although she concedes that she showed Reed the new schedule before releasing it. According to Coppola she decided to reduce Reder’s hours from 22 to 10, because she couldn’t rely on her. Coppola contends that by Wednesday, September 12, Reder had not gotten back to her as to her availability and her response to Coppola’s proposed schedule given to Reder on September 10. Further Coppola asserts that she had been informed on Saturday, September 8, by Reder’s mother that Reder was “trying out a new job,” that Reder had given Coppola short notice on vacation plans contrary to Respondent’s policy, and that when she called on Friday, September 7, to inform Respondent that she would not be in on Tuesday and Wednesday, September 11 and 12, Reder did not speak to a manager about that matter.

Coppola also testified that the hours that Reder had worked in August were assigned either to Coppola herself or to a new employee who started work for Respondent that week.

In that regard, Respondent’s records reveal that for the week of September 16–22, Coppola assigned herself 49 hours, rather than the 45 that she normally worked. Tisha began working for Respondent on Wednesday, September 19, when she was assigned to work from 11–5. During August, Reder worked Wednesday from 11:30 to 5. In August, Reder had been working 12:30 to 6 p.m. on Mondays, and in fact was also assigned those hours the week of September 9 through 15. For the week of September 16, it is not clear whether those particular hours were assigned for that day to anyone. Thus, Coppola assigned herself 9.5 hours that day from 8 to 5:30 p.m., but she did not work on Mondays in most of August when Reder received her regularly scheduled 22 hours, but did work on Mondays the week beginning August 26, as well as on the first 2 weeks of September. The record also reflects that the number of hours on Respondent’s schedule did decline from mid-August through early September, and it reached a low point of 176 hours the week of September 2–8, and then rebounded and leveled off to between 214–232 hours from September 16 to October 13. It also appears that during the week of September 9–15, a former supervisor, Mike Keough, was transferred into the department. He, as the record discloses, was intended to replace Mary Roland, who was to be transferred to the front end. However, Keough worked full time, while Roland generally worked 12 hours per week. In that regard however, I note that while Roland was on the schedule for the week of Septem-

ber 16 to 22, she left the job during that week,³¹ so that for the week of September 23 to 29, she was not on the schedule. For that week, Keough worked 40 hours, Tisha became full time, working 37.5 hours, and Bridget returned from vacation, and her hours were increased from 17 (her hours prior to vacation) to 30, when she returned the week of September 23–29.

D. The Alleged Discharge of Mary Roland

Mary Roland was hired by Respondent March 1 to work part-time as a front-end employee which consists of greeting customers, handing out flyers, and pointing people in the direction of products, handling returns and voids. The job includes training as a cashier, although it is not a cashier's position. During her interview she informed Reed that she had previous experience as a cashier at Stop & Shop. After training for Respondent for about a week in the front end, including cashier training, she was transferred to the natural living department, prior to the opening of the store.³²

Roland worked for Respondent on Monday, Wednesday, and Friday, from 2–6 p.m. This was a set schedule, since she had another part-time job from 9–2 at Northwestern Mutual Life. However, about five or six times, pursuant to an arrangement with her managers, when her workload at Northwestern permitted, she would call her manager and if work was available for her, would work extra hours for Respondent.

There is no question, and admitted to by Respondent's witnesses, that Roland was an excellent and well regarded employee in the natural living department. Her 90-day evaluation, dated June 25, prepared by Griffin was primarily positive, but did contain some criticism, including "a little inflexible with scheduling—due to other job," and that she sometimes comes in late due to her other job. As a request to improve, Griffin requested that she come in on time, and "possibly become a little more flexible with the schedule." As a result of this evaluation, Roland received a \$1 raise. During the evaluation, Griffin spoke to her about being more flexible on her schedule. Roland agreed, and said that she had her other job from 9–2, but she could at times deviate from that, and if so she would call and tell Griffin about such availability.

In mid-March, after the store opened, Roland noticed the Union picketing outside and asked Griffin "what was going on?" Griffin explained that the Union was picketing because Respondent was not a union store. Griffin asked if Roland had her union talk. She said, "no," and Griffin brought her in to speak with Perry. Perry informed Roland that none of Respondent's stores are under contract with a union, because "we don't feel we need that." Perry added that the Union has a right to be "out there," but not to be outside the door. Perry instructed Roland that if the union picketers approach her or harass her in any way, to tell someone.

Roland also spoke to Coppola about the Union, when Coppola was still a clerk. Coppola informed Roland that she used to work for Food For Thought when Wild Oats owned the store, and that the Union organized that store. Coppola stated

that she did not believe that the Union helped the employees in any way at Food For Thought.

On or about May 10, Roland asked Griffin "what happened to Diane Lane?" Griffin replied that "Diane is no longer employed." Roland asked, "why?" Griffin answered that "Diane was "crazy," called corporate and wanted to "talk to the guys outside."

In late July, Roland and Reder (who had by then stepped down as manager) discussed Respondent's unfair treatment of Diane Lane, as well as the fact that other employees were being treated unfairly. Reder suggested that it was a good idea to find out more about the Union, and Roland agreed. Roland volunteered to contact the Union, and shortly thereafter she did so, and met with Brian Truini at the union office. Truini explained the Board's election process to her, and gave Roland some authorization cards to distribute to fellow employees.

On August 8, Reder and Roland asked for and received permission from Coppola, who was by that time the manager, to go on a break. They went to Respondent's juice bar to have some tea. Reder, after speaking with an employee at the juice bar, informed Roland that this woman was having a hard time, and suggested that Roland sign her up for the Union. This woman had previously expressed interest in the Union to Reder. Roland gave the employee a card and asked her to read it. The employee signed the card and handed it back to Roland. At that time, employee Peter Boyne another employee working at the juice bar, asked Roland for a card for himself and one for his brother, who works over in Food Service. Roland gave Boyne two cards. Reder went back to the natural living department, while Roland waited for the return of the two cards from Boyne. A few minutes later, Boyne returned two signed cards to Roland.

Later on that day, Reder told Roland that two employees in the grocery department were interested in the Union. Therefore, when Roland went into the stock room to bring out some stock, she saw these two employees there. Roland told them that Reder had indicated to her that they were interested in the Union, and she gave them each cards. They both signed and handed the cards back to Roland. This was the only day that Roland distributed any union authorization cards to employees.

Roland then returned to work. About 45 minutes later, Roland was summoned into the office of the store director, Adam Schwartz, the grocery manager who was the manager in charge that day, and Marshall Lovell, food service manager were present, along with Coppola. Schwartz informed Roland that, "it has come to our attention that you have been soliciting employees on company time and we have a strict policy against that which is posted at all times." Schwartz handed Roland a copy of a document entitled "Solicitation and Distribution of literature on Wild Oats property." This document prohibits solicitation during worktime, in working areas, and also defines work areas and working time. Schwartz asked Roland to read it and if she understood it. Roland replied, "yes" and the meeting ended.

Both Lovell and Schwartz admit that Roland was called into the office, because of her solicitation of authorization cards. Thus, Lovell testified that he was informed by his assistant manager that Peter Boyne was showing a union authorization

³¹ Roland's status will be discussed more fully below.

³² The above findings as to Roland's interview, training, and transfer, are based primarily on the credited testimony of Reed.

card to somebody in the deli area while working. Subsequently he reported this fact to Schwartz, and they called Boyne into the office. Schwartz showed Boyne the same no-solicitation rule that he showed to Roland and asked if Boyne understood it. According to Lovell, Boyne volunteered that he had received the card from a “red headed girl” in the natural living department, and that Boyne pointed out Roland to Lovell, as the person who gave him the card. Lovell conceded on cross-examination when he found out that Boyne received a union card, it was a big issue, because it involved union solicitation, and that it was union solicitation that he was concerned about.

Schwartz also admitted that either he or Lovell reported the incidents involving Roland and Boyne to Reed when he returned to work the next day.

On Monday, September 17, Roland was called into Reed’s office at about 3 p.m. Coppola was also present. According to Roland, she was told by Reed that due to restructuring that was going on in the store, Mike Keough was being brought over from the front end to the natural living department and was going to be working full time from 1–9. Therefore there would be no need for her hours in the department. She asserts that she asked about Bridget, and Reed responded that “Bridget was willing to work with him regarding her hours.” Roland contends that she asked when this was effective and Reed replied “now.” Then Roland claims that Reed said that Roland was free to go talk to Deb (the front-end service manager) to see if she needed any cashiers. Roland said okay and left the office.

Roland went to see Deb and told her that Reed instructed her to see if Deb needed cashiers. Deb asked Roland the hours that she was working, and after looking at the schedule told Roland, “[N]o, I can’t use you those hours. I have nothing.”

Roland asserts that she then found Coppola and told her that Deb said that she had no positions for Roland. Roland added that it would be silly for her to stay until 6 p.m. when she had nowhere to go on Wednesday. Roland testified that Coppola said, “I thought Scott cleared it with Deb. I’m sorry.” Roland further claims that the conversation ended, and that on her way out to punch out, Coppola was coming out of Reed’s office. However, according to Roland neither Coppola nor Reed attempted to stop or speak to Roland.

Coppola and Reed’s version of events, is significantly different than Rolands. According to both Coppola and Reed, after Reed informed Roland of the restructuring and the transfer of Keough to natural living, Reed informed Roland that she would be transferred to the front-end cashier position. Reed added that Roland would work the rest of the week in natural living, and that Reed would sit down later in the week with Roland to go over her schedule, new duties, and anything else that she needed.

However, notwithstanding these comments, Reed and Coppola assert that Roland went immediately to speak to Debbie Doshno, front-end manager. After being informed that Doshno³³ “I’m just going to go.” Coppola claims that she asked Roland to wait until she found out what’s going on, but

³³ Reed testified that he had previously instructed Doshno that Roland was to be transferred over to her department, but that Doshno “screwed up,” and he subsequently reprimanded her for it.

Roland replied: “[N]o, I’m gonna get you, you made a very big mistake.” Coppola then notified Reed of her conversation with Roland. As she was going into Reed’s office, Coppola saw Roland coming out of the backroom. Coppola again asked Roland to wait, and Roland replied, “[N]o, you made a mistake, I’ll see you soon.” Roland then left.

It is undisputed that Roland left and made no effort to contact Respondent thereafter. It is also undisputed that Respondent made no effort to contact Roland, to clear up what Reed concedes that was an alleged misunderstanding between Reed and Doshno and Roland. Reed testified that he did not try to contact Roland, because he had made it extremely clear to Roland that she would have a job as a cashier, with the same hours, and that her hours would be worked out. He added that Roland had decided on her own to speak to Doshno, and “I’m not gonna chase her down.”

In this instance I credit the mutually corroborative and believable testimony of Coppola and Reed concerning the portions of their testimony that differs from that of Roland. I note that their testimony is also corroborated by the contemporaneous memos prepared by both Coppola and Reed immediately after the discussions with Roland. I also found their version of events more plausible, since I find it more likely that Respondent would attempt to not effectuate the transfer to the front end immediately, as testified to by Roland, since the schedules were already made up for the week of the conversation. It is more likely, as testified to by Reed and Coppola that the Respondent would permit Roland to finish out the week in natural living in accordance with the schedule already in effect.

I also credit Reed’s testimony that he had spoken to Doshno, prior to informing Roland of the transfer, but Doshno had apparently misunderstood his instructions, and that he subsequently reprimanded Doshno for “screwing up.”³⁴

Reed also furnished testimony as to Respondent’s reasons for transferring Roland to a cashier’s position. According to Reed, corroborated by both Bernier and Coppola, Respondent at around this time was restructuring the store by eliminating the position of eight front-end supervisors. This position which encompassed eight employees included employees who handle voids, deal with customers, do the redemptions and have keys to the registers and pick up cash. Respondent decided to eliminate these positions and have an assistant service manager perform those functions, which necessitated finding positions for these former supervisors in different departments of the store. One of these front-end supervisors was Mike Keough, who had expressed interest to Reed in working in the natural living department. Additionally, Reed was aware through Coppola, that Coppola, due to the quitting of employee Kate McGraw,

³⁴ The General Counsel argues that I should draw an adverse inference from Respondent’s failure to call Doshno as a witness. *Grimmway Farms*, 314 NLRB 73 (1994). However, although the record discloses that Doshno is Respondent’s front-end supervisor, the record establishes that she is a supervisor or an agent of Respondent. I therefore find it inappropriate to draw an adverse inference against Respondent for its failure to call her as a witness. Moreover, even if I did draw such an inference, my credibility resolutions would not change.

needed someone to work late hours and “close” the store.³⁵ Therefore Reed contends that he decided to move Keough into the natural living department, since he had full time availability, and could work the hours until 9 p.m. to “close” the department. Respondent’s schedule revealed that Mike Keough began working in the natural living department on Monday, September 10, and that he worked full time, and primarily until 9 p.m. Additionally, Reed had previously spoken to Bridget Steele, a part-time employee, about increasing her hours in the department, and she had agreed to do so. The record reveals that after Steele returned from her vacation, she did increase her hours to 30, from the week starting September 23.

Reed admits that he did not ask Roland if she would be willing to increase her hours, as he did with Steele, but explained that he knew from Coppola that Roland had another job, and would not likely be able to be flexible in increasing her hours.³⁶ Further Reed testified that Respondent was in the process of a new marketing campaign, which included concentration on customer service and beefing up the front-end staff. Thus, he asserts that since Roland was a friendly person, that she had experience as a cashier, and that she was no longer needed in natural living, he decided to transfer her to a cashier’s position. Reed also noted that the cashier’s position entailed no reduction in salary or benefits, and is not considered a less desirable job than a clerk.

The record reveals and Reed admits that Respondent also hired a new employee Tisha Iannacone as a clerk in the natural living department. She applied on September 6, was hired by Respondent to start on Wednesday, September 19, during the same week that Roland was notified that she was no longer needed in the department, and would be transferred to a cashier’s position. Iannacone had no natural living work experience, but she did have sales experience, and had expressed an interest in natural living and natural medicine. Further, she was available for full-time employment, and in fact has worked between 32 and 37.5 hours per week for Respondent.

E. The No-Solicitation Rules

As related above, I granted a motion by the General Counsel at the trial to amend the complaint to allege that Respondent violated the Act by maintaining an overbroad no-solicitation rule and by implementing another no-solicitation rule in response to the Union’s organizing campaign. Respondent objected to the amendments on the grounds that the amendments were not closely related to the underlying charges, and that it received insufficient notice of these allegations.

In that regard, none of the charges or amended charges contain any specific reference to a no-solicitation rule. However, the second amended charge in Case 34–CA–9586 does allege that since March 13, Respondent implemented a rule prohibit-

ing employees from engaging in union or other protected concerted activities in nonwork areas on nonworktime and by threatening employees with discharge if they engage in union or protected concerted activities in nonwork areas on nonworktime.

Further, the initial complaint alleges that Respondent on March 13, implemented a rule prohibiting employees from engaging in union or other protected concerted activities in nonwork areas on nonworktime.

Moreover, during the investigation of subsequent charges filed, alleging the unlawful discharge of Mary Roland, the record reveals that General Counsel met with Respondent’s attorney and Respondent’s witnesses Coppola and Reed. During the course of the meeting, both Coppola and Reed informed the Board Agent that the no-solicitation rule, which was shown to Roland on August 8, as detailed above, was the same rule that appears in Respondent’s handbook. It is also undisputed, that it was not until the trial that the General Counsel received the handbook as a result of a subpoena.

It is also clear that the rule in the handbook is significantly different than the rule shown to Roland (and to Boyne) on August 8. The rule in the handbook is entitled “Soliciting” and reads as follows:

We do not allow people to panhandle, sell merchandise or solicit our customers either in or near the store. If you see this happening, politely ask the person to stop. If they refuse or become belligerent, call the MOD and then call the police if the problem persists. Staff members are prohibited from soliciting financial contributions or distribution of materials or literature on store premises without written consent of your General Manager.

Moreover, in its position paper submitted to the Region on October 24, Respondent asserted that it has maintained a legitimate no-solicitation rule, which it maintains has been posted throughout the store. The position paper does not refer to the handbook.

Respondent adduced no evidence during the trial to explain the discrepancy between the rule in the handbook and the rule, purportedly in effect, which it asserts has been posted throughout the store since it opened.

In that regard Coppola testified that when she was first employed by Respondent as a clerk, she noticed the no-solicitation posted on the bulletin board in the employee breakroom, and also read the handbook, which had a different rule. Her testimony was “I thought the one in the handbook was sufficient,” but she never asked any supervisor about the difference in the rules or which one was applicable.

Additionally, after she became a supervisor, she never discussed the rules with any supervisors and it never came up in any managers meetings.

Reed testified that the rule shown to Roland was posted in the employee breakroom, behind glass, as well as by the time-clock. He also concedes that he knew that there was a no-solicitation rule in the manual, but he never noticed or thought about the fact that the rules were different.

Bernier testified that he posted the rule that was shown to Roland in the employee breakroom shortly before the store

³⁵ Coppola corroborated Reed as to this testimony.

³⁶ Coppola corroborated Reed in part by testifying that she had asked Roland, shortly after she took over as manager about the possibility of her increasing her hours. Roland said that it would be difficult, as her other job would keep her from being flexible. However, she did tell Coppola that she would try to be flexible, and in fact Coppola admitted that once or twice, Roland did accommodate Coppola’s request to work additional hours.

opened, after being instructed to do so by the home office. He also admitted that although he knew that there was a no-solicitation rule in the manual, he never read it and did not know its contents.

Schwartz also testified that he saw the rule, when the store opened, posted on the bulletin board, behind glass doors, with other OSHA documents and other notices. He admits that immediately after his meeting with Roland, where he showed the rule to her, he posted it next to the timeclock. He testified that he did that, even though it was already posted on the bulletin board because "I wanted to make sure people saw it," and that in regard to the posting on the bulletin board, "I don't think anyone really regards the glass at all. It's just there with a bunch of OSHA documents." Schwartz further testified that when he found out about Roland soliciting union cards in the store, he was aware of the rule, but the fact the rule may have been violated, "didn't immediately jump to mind. I just thought it was like a big issue when I was told about it." When asked why it was a big issue, Schwartz replied, "I think I was concerned about union solicitation when I was told someone was soliciting for the union."

Therefore, since Bernier was not in, and he was in charge of the store, Schwartz called corporate counsel and spoke to Brier. He explained to her what had occurred, and she instructed Schwartz to have the employees involved read a copy of the rule and make sure that they understood it. She also instructed him to make sure that the rule was posted where everyone could see it. He therefore posted the rule by the timeclock.

According to Lovell, he saw the rule posted in the employee breakroom, since the store opened. He also testified that prior to the store opening, he first saw a copy of the rule at a manager's meeting conducted by Perry. At this meeting, Perry informed the managers that Respondent was "trying to keep them (Union) out." In that regard, she instructed managers that if anyone from the Union came in and tried to solicit the managers should ask them to leave. As for employees, Perry instructed managers that Respondent didn't have the right to talk to the employees when they were on break. Lovell also conceded that he knew that Respondent's policy was that it wanted to keep the Union out, and that when he found that Boyne received a union card it was a "big issue," because it involved union solicitation. Lovell was aware of the handbook, and knew that the handbook contained a no-solicitation rule that was Respondent's policy for employees. He was not asked if he was aware of or noticed the difference between the rule in the handbook and the rule that was posted.

In this regard Lovell began working for Respondent at its West Hartford store, where he was trained to work at Westport. Schwartz worked for Respondent at other stores before being transferred over to Westport. He asserts that he never saw the no-solicitation rule at any of Respondent's other stores when he worked there.

Perry, who as noted above is Respondent's regional human resource manager, testified about a number of matters, but furnished no testimony about Respondent's no-solicitation rule either at the Westport store or at other stores under her jurisdiction. The same can be said for Jim Ware, Respondent's former regional director for the Northeast group of stores.

Both Reder and Roland testified that they never saw the no-solicitation rule posted until after the August 8 meeting, when Roland observed Schwartz posting it by the timeclock. They both deny ever seeing it posted in the glass enclosed bulletin board or anywhere else. Reder testified that she saw a copy of the policy on the table in the breakroom in September. Roland testified that she recalled the bulletin board enclosed in glass, but denied that it contained any notices from OSHA, minimum wage, sex discrimination, etc. Reder, on the other hand, conceded that the bulletin board with glass, contained OSHA, discrimination, and worker's compensation papers.

I credit the mutually corroborative testimony of Respondent's witness that Respondent's no-solicitation policy that was shown to Roland and Boyne on August 8, had been posted on the bulletin board in the breakroom from the time the store opened on March 15.

Although Reder and Roland testified to the contrary, I find these denials unpersuasive, since it is clear that they were uncertain as to what was posted therein, and in fact their testimony contradicted each other as to whether OSHA or other employment notices were posted on that bulletin board.

F. All the Store Meetings

On March 14, the day before the store opened, Bernier conducted an all store meeting at about 5 p.m., with about 50-70 employees in attendance. Bernier introduced Respondent's managers and gave out awards for people that worked hard during the training period, prior to the store's opening. The produce manager translated Bernier's remarks for the Haitian speaking employees.

Bernier then read a speech word-for-word to the employees about Unions. The speech reads as follows:

There have been a lot of rumors floating around about union interest in this store. There have also been a number of articles in the local papers over the past few weeks about Wild Oats and the Union. I wanted to clear the air about all of these issues, and address what may happen over the next few weeks at the store. *First of all, I want you to understand Wild Oats' position on Unions.*

Wild Oats believes that we provide a decent work environment, good wages and benefits, and opportunities for advancement to all staff members. I will see that there is always open communication between staff members and their supervisors, and when we do something stupid, we generally are willing to admit our mistake, correct it and move on.

We don't believe labor unions have a place with Wild Oats. They don't understand our culture or our business (The United Food and Commercial Workers Union has called us the "Happy Chicken" Company and made fun of what we sell—they believe it's some kind of scam). A labor union doesn't provide anything to staff members other than a paid middleman who drives a wedge between staff and supervisors.

A Labor Union takes money from their members in the form of Union dues, and loads down their members with a pile of additional rules about

What they can and cannot do [sic] their job,
Who they can and cannot complain to if they
have a problem and

How they have to support the Union, even when
the employee think[s] the Union is wrong[.]

(You should see a union's constitution and bylaws if you think we have a lot of rules!) For that reason and many others that I would be glad to discuss with you, we do not believe a union is appropriate for Wild Oats' staff and will strongly oppose an organizational attempt by any union.

Let's talk about what the Union has said and done about us.

First, they have said that the employees over at the Food For Thought Store, which is unionized, are "entitled" to jobs in our store. We don't own Food For Thought, and what they do with the Union is their business, not ours. If people ask me about Food For Thought, I will tell them to go ask the owners of Food For Thought.

Second, the Union has sent postcards to a lot of the people living in Westport, asking the Westport community to not shop at this store. The Union claims it is protecting workers, but I'd like to know whose workers its protecting—certainly not us. If customers don't shop our store, we don't have jobs. I'd like to know how asking people not to shop at this store is good for the staff of this store. If you ask me, they are trying to hurt all of our jobs here, not help us, because we aren't paying them dues and letting them talk for us.

Third, the Union has paid a bunch of the Stop & Shop employees to come here to walk a picket line against us, starting this week, as another effort to keep people from shopping at our store.

Again, this doesn't help the staff at this store—it is another attempt to hurt all of our jobs and the Stop & Shop employees certainly don't care about us or our jobs—they just want to make sure their store doesn't lose business to Wild Oats. The picketers will be out in front of the store for a couple of weeks, probably, with signs and handouts accusing Wild Oats of all kinds of terrible things. I would ask that none of you get in any kind of confrontation with the pickers[sic]—no shouting matches, no name calling. Just ignore them, and eventually they will go away. If any customers want to talk about the picketers or what they are saying, please call me and I will be happy to talk with them.

You may be contacted by the Union in the future—they may invite you to their meetings and promise you a lot of things if you agree to let them represent you. It's your right to talk with them, but what they tell you about what they can do is just empty promises—they can't deliver on anything. Wild Oats can, and will, deliver on a great job in a great store for all of us, with good pay and profit sharing if our sales are good and the Union doesn't keep our customers out! and if the Union asks you to sign a card or other document—even if they say it really doesn't mean anything—*Don't sign it*—you will be giving

away your right to talk with me or your supervisor about issues important to you and your job.

We have a great store here, with a terrific future—Let's work together to make it a fun place to work and shop. If anybody has any questions, please come talk to me.

According to former employee Jodie Fretina, during the course of this speech, after telling the employees that there would be picketers outside the store the next day, Bernier said, "[D]on't fight with them. You know, just stay away from them. If you talk to them you will be terminated immediately."

I do not credit Fretina's testimony in this regard. Instead I credit the mutually corroborative testimony of Bernier, Reed, Perry, Schwartz, and Cota, that Bernier did not deviate from the script that he was reading, and that he did not threaten to terminate employees for talking to the Union. I note that Fretina's credibility is somewhat suspect, since she left her employment after being denied a promotion that she felt that she deserved, which tends to diminish her objectivity towards Respondent. More importantly, her recollection of the speech was somewhat sketchy, and she may have simply misinterpreted Bernier's statements in the speech that he "would ask that none of you get in any kind of confrontations with the picketers. Just ignore them, as . . . if customers want to talk about picketers . . . please call me," and somehow believed that he was ordering employees not to talk to picketers, and threatening discharge, if they did so.

On Thursday, September 6, Respondent held another all store meeting concerning unionization in its workplace. Bernier and Mike Kuroyoma, regional director of operations ran the meeting. During the course of this meeting, Kuroyoma read verbatim from a prepared script as follows:

Good Morning, I'd like to talk with you about the Union for a few minutes this morning.

All of you have seen the picketers out front of the store. They haven't been around for a while, have they? Their job, when they are there, is to tell our customers not to shop here because, according to the union, Wild Oats treats all of you poorly. The Union claims that they are picketing out there to protect *YOUR* interests, but all they want to do is *HURT* the business of this store, which hurts *ALL OF US*. I don't understand how they can claim that to be in your best interests, can you?

The Union has recently run some ads in the local newspapers and on radio, and put up a billboard, claiming that we have refused to hire some people who work for the Food For Thought store, and that our refusal to hire those people is illegal. Wild Oats knows that it has not done anything that is illegal, and that when the facts of the Union's claim are heard by a judge, we will be found innocent of any kind of illegal activity.

Some staff members may wonder why we haven't run our own ads or done other things to contradict the Union's ads and newspaper articles. As someone once said to me—"Don't get in a peeing match with a skunk—you always come out smelling." The Union wants us to make a big deal out of their ads and billboards to call more atten-

tion to their claims. We aren't going to do that—we believe that ignoring them is the best treatment. Look at the picketers—when no one paid a lot of attention to them, they stopped showing up! If customers ask you about the ads, we do have a letter from Dave that should answer their questions. Copies are at the front cash registers.

The Union has also claimed that Dave Bernier threatened you, the associates of this store, if you talked to the picketers out front. Again, I know that this is untrue, and that Dave did not threaten anyone. But I am also telling you that you are free to talk with the picketers—that is your legal right. But please, avoid any kind of shouting matches or confrontation—that only gives the Union what they want.

Wild Oats believes that you don't need a Union talking for you. We believe that Unions only create a bad atmosphere, where no one trusts anyone else. We don't believe that you should have to *PAY* a Union weekly dues and initiation fees to speak for you with your supervisors at any time, without someone in the middle. Wild Oats offers you a fair wage, with good benefits, without a Union.

The Union may try to get you to sign an authorization card. Remember, this card gives away to the Union you[r] rights to deal directly with Wild Oats, and may have significant legal consequences to you. Before you sign anything, make sure you understand what your rights are and what you are giving away.

Thanks for all you each do to make this a great store and thanks for your attention this morning—if you have any questions, please talk to me, Scott of your Department Manager.

Bernier then read, also verbatim, a September 5 letter that had previously been distributed to Respondent's employees. This letter is set forth below:

September 5, 2001

Dear Wild Oats Market Associates:

In view of the continued union picketing at our Westport store, we would like to once again share with you the Company's position concerning unions.

It is Wild Oats' position that a labor union would not be in the best interest of our associates. We feel that a union would be of no advantage to any of us—it would hurt business which we all depend on for our livelihood. We believe that it is more beneficial for you and the company to maintain the "team" attitude, respect and working relationship that we have as opposed to the "adversary style" attitude of a union.

Wild Oats has enthusiastically accepted the responsibility to provide you good working conditions, fair wages and benefits, fair treatment, open communication and the respect which are rightfully yours. These are things that cannot be purchased with union dues. Your wages and benefits are the direct result of Wild Oats' success; not from outside pressure.

Wild Oats wants to continue to communicate directly with you, without you having to pay union dues to have a

third party's intervention. We know that you want and are able to express your problems, suggestions and comments to us so that we can understand each other better. This can continue to be done without having a union jammed between us. We want you to speak for yourself—directly to us. We will continue to do our best to listen and respond.

Union organizers have been known to approach associates with unsubstantiated promises. At some time, you may be asked to sign a union card to "request an election" or for some other stated purpose. In spite of what you have been told, signing a union card has great legal significance. If you sign a card, it legally assigns your personal right to representation to the union and you could find yourself represented by a union without an election. We urge you to think carefully before making any commitment to a union organizer.

A union can have very adverse effects—when unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced. We want to keep Wild Oats free from the tension that can be brought on by a union.

We are pledged to high standards of individual treatment and respect for all associates and we will continue to seek to achieve growth, opportunity and job security for all of us.

Your efforts, hard work, customer relations and positive attitude are greatly appreciated and certainly the key to your individual as well as the company's success. Together we have build a strong foundation for a prosperous future for all of us and it is our desire that this "team" relationship flourish.

Sincerely,

Dave Bernier Store Director	Scott Reed Asst. Store Director	Mike Kuroyama Regional Director of Operations
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Wild Oats Market
399 Westport Road
Westport, Connecticut

G. The August 8 Flyer

On August 8, after Schwartz met with Roland concerning Respondent's no-solicitation rule, as detailed above, he gave Lovell and Coppola copies of a document from corporate headquarters to be distributed to employees. This flyer contains a copy of the Union—authorization card, and is entitled "Would you sign a blank check?" The document contains arrows that point to various sections of the card, and include some comments. One of the arrows points to the words "collective bargaining" on the card. The document goes on to comment, "in collective bargaining you could lose what you have now."

IV. ANALYSIS

A. The All Store Meetings

The complaint alleges and the General Counsel contends, that Respondent, by comments made by Bernier during the March 14 all store meeting violated Section 8(a)(1) of the Act, by implementing a rule prohibiting employees from engaging

in union or protected activities in nonwork areas on nonwork-time.

This allegation is based upon the testimony of Fretina that while discussing the union picketing that would be taking place the next day, Bernier issued a direction to employees, “don’t talk to them, just stay away from them.” However, I have not credited the testimony of Fretina in this regard, and found that Bernier followed Respondent’s written script, which merely stated: “I would ask that none of you get in any kind of confrontation with the picketers—no shouting matches, no name calling. Just ignore them, and eventually they will go away.”

These comments can hardly be construed as implementation of a rule prohibiting employees from engaging in union or protected activities, or even a direction not to engage in such conduct. It is merely a request by Respondent to avoid confrontation with picketers, and the statement “just ignore them,” is part and parcel of that request and I do not find such statements to be coercive or unlawful. I therefore recommend dismissal of this allegation.

It is also alleged that Respondent by Bernier, threatened to terminate employees if they engaged in union or protected activities. This allegation is also based on Fretina’s testimony that I have not credited. I therefore recommend dismissal of this allegation as well.

On September 6, Respondent held another in store meeting, during which Bernier read verbatim to employees a September 5 letter that Respondent had previously distributed to them. General Counsel points to two portions of this speech, which it asserts are violative of the Act.

First, General Counsel points to the statement in the letter that reads: “we feel that a Union would be of no advantage to any of us—it would hurt business which we all depend on for our livelihood.” In this regard, General Counsel contends that this remark amounts to a prediction of adverse consequences of unionization, without any objective considerations for this prediction. Thus, it amounts to an unlawful threat of unspecified reprisals, if employees select the Union as their representative. *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3 (1992); *Eldorado Tool*, 325 NLRB 222, 222–224 (1997). I agree.

It is well settled that employer predictions of adverse consequences arising from sources outside his control are required to have an objective factual basis in order to be permissible under Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969); *Blaser Tool & Mold Co.*, 196 NLRB 374 (1972); *Long Airdox Co.*, 277 NLRB 1157, 1158 (1985).

Here, Respondent has equated the employees’ choice of the Union with the loss of business “which all depend on for our livelihood.” Yet it provides no facts or other evidence that indicates how or why unionization could cause Respondent to lose business. In these circumstances Respondent’s statements amount to an implicit threat of job loss or other reprisals as a result of the employee’s decision to select the Union, and is violative of Section 8(a)(1) of the Act. *Hoffman Security, Ltd.*, 315 NLRB 275, 277–278 (1994) (statement that hospital customer of employer might cancel contract with employer because of unionization, found to be “clearly speculation” . . . “with no factual basis”); *Metalite Corp.*, 308 NLRB 266,

272 (1992) (statement that customer would remove dyes from plant if organized, unlawful, absent objective evidence to support remark); *Long Airdoux*, supra (statement that customers would not send work to a “non-union” company not based on objective facts); *Blazer Tool*, supra (statement that customer would withdraw its patronage if employees voted for the Union, constituted implied threat of job loss, absent any factual basis for assertion that customers would withdraw patronage if union was selected).

Accordingly, I find that Respondent has violated Section 8(a)(1) of the Act by this statement in the letter to its employees.

The General Counsel also alleges that when the letter stated that “a Union can have very adverse effects—when Unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced,” Respondent threatened employees with job loss if they selected the Union. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); *Mack’s Supermarkets*, 288 NLRB 1082 fn. 3 (1988); *Gino Moreno Enterprises*, 287 NLRB 1327 (1988).

This contention raises the issue of the degree of detail required of an employer who informs employees that they are subject to replacement in the event of an economic strike. In that regard an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike, unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats. *Eagle Comtronics, Inc.*, 263 NLRB 515, 516, (1982).

Where the employer’s statements about permanent replacements make specific reference to job loss, such statements are generally deemed to be unlawful. *Baddour, Inc.*, 303 NLRB 275 (1991); *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989); *Gino Morena*, supra; *Sigma Network Corp.*, 317 NLRB 411 (1995). Thus, the phrase “lose your job” conveys to the ordinary employee the clear message that employment will be terminated. Further, if the employee is also told that his job will be lost because of replacement by a “permanent” worker, the message is reinforced. In these circumstances, where the single reference to permanent replacement is coupled with a threat of job loss, “it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job.” *Baddour*, supra.

Here, Respondent’s statements in the letter clearly indicated to employees that they will then likely lose their jobs if they are replaced as a result of a strike and based on *Baddour*, supra, and the other cases cited above, may fairly be understood as a threat of reprisal and are violative of Section 8(a)(1) of the Act.

Moreover, another significant element in assessing the legality of the employer’s comments about strike replacement is the context of the statements. Thus, when the Board evaluates the remarks, it considers the totality of the relevant circumstances, including a background of other unlawful conduct, to assess the coerciveness of Employer’s conduct. *Mediplex*, supra, *Casa Duramax Inc.*, 307 NLRB 213 (1992); *Mack’s Supermarket*, supra; *Sigma Network*, supra.

Here, as in the cases cited above, Respondent committed several other violations of the Act, both during the same com-

munication and speech to employees, as well as by prior threats. Thus, I have found above that in the same letter to employees, Respondent violated Section 8(a)(1) of the Act by threatening employees with job loss if the Union were to come into the store. Moreover, as I will detail more fully below, I find that Respondent violated Section 8(a)(1) and (3) of the Act by terminating Diane Lane on May 8 because of her union activities, and that at her termination interview, it further violated Section 8(a)(1) of the Act by unlawfully interrogating Lane and unlawfully creating the impression that Lane's union activities were under surveillance. Additionally, I find below that on August 28, a mere week before the letter was distributed to employees, Respondent violated Section 8(a)(1) of the Act, by threatening Reder with suspension, because she supported the Union, and because she accused Respondent of unlawfully terminating Lane.

I conclude that these unfair labor practices tend to color the Respondent's statements in its letter and its speech to employees, and render such remarks and statements coercive and violative of Section 8(a)(1) of the Act. *Mediplex*, supra; *Casa Duramax*, supra; *Syigma Network*, supra; *Mack Supermarkets*, supra.

B. The August 8 Flyer

As noted above, on August 8, Respondent distributed a flyer to its employees, wherein it made several negative comments about the Union, in the context of making statements and pointing to portions of a sample union authorization card. While pointing to the word collective bargaining on the card, Respondent observes "in collective bargaining you could lose what you have now." It gives no further explanation of the collective-bargaining process, and Respondent made no effort to explain any further what it meant to its employees. General Counsel contends that this statement is unlawful, and can reasonably be construed as a threat of loss of existing benefits, *Lear Siegler Management Service Corp.*, 306 NLRB 393 (1992). I agree.

Although Respondent's statement that in "collective bargaining you could lose what you have now," is literally correct, it does not adequately explain to employees that the loss of benefits could occur as a result of the normal give and take of collective-bargaining negotiations. In these circumstances, the statement can reasonably be construed as a threat of loss of existing benefits. *Lear Siegler*, supra; *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994); *Kenrich Petrochemicals*, 294 NLRB 519, 530 (1989); *S.F. Nichols, Inc.*, 284 NLRB 556, 577 (1987); cf., *Teller Communications*, 294 NLRB 1136, 1140 (1987); and *Jefferson Smurfit Corp.*, 325 NLRB 280 fn. 3 (1998), where such statements were deemed lawful, because they included adequate explanations of the give and take of collective bargaining, while mentioning the possibility of a loss of benefits. Moreover, as in the case of the Respondent's statement about strike replacement and job loss, the Board considers, whether they were made in a context free of other unfair labor practices. *Kenrich*, supra; *S. E. Nicholas*, supra; *Taylor Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980). Here, as I have detailed above, Respondent has committed several unfair labor practices, both before and after this August 8 flyer was distributed, which gave a threatening color to Re-

spondent's statements in the flyer. *Kenrich*, supra; *Belcher Towing Co.*, 265 NLRB 1258, 1268 (1982); *Coach Equipment and Sales Co.*, 228 NLRB 440, 441 (1977); *Taylor Dunn*, supra. Accordingly, these other unfair practices support my conclusion that Respondent has unlawfully threatened to reduce benefits in violation of Section 8(a)(1) of the Act by this flyer.

C. The May 9 Alleged Threat of Job Loss

I have found above that on May 9, the day that Lane was terminated, Roland asked Griffin what happened to Lane. Griffin responded that Lane was terminated because Lane was "crazy," she called corporate and wanted to "talk to the guys outside." It is clear that Griffin was referring to the union pickets, when mentioning the guys outside, and that therefore Griffin was informing Roland that one of the reasons for Lane's discharge, was Lane's protected conduct. Such comments by Respondent constitutes an implicit threat that Respondent will discharge other employees for engaging in union activities, and is violative of Section 8(a)(1) of the Act. *P.E. Guerin, Inc.*, 309 NLRB 666, 669 (1992); *Penn Color, Inc.*, 261 NLRB 395, 405 (1987). I so find.

D. The No-Solicitation Rules

Before assessing the merits of the no-solicitation rule allegations, it is necessary to consider the procedural objection raised by Respondent to the amendments to the complaint that encompassed the allegations relating to the rules. In that regard, Respondent asserts that the allegations are not "closely related" to any of the charges filed by the Union, and that under applicable Board precedent are time barred by Section 10(b) of the Act and the amendments should have been denied. *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988). Respondent asserts that the new allegations do not involve the same legal theory as any of the allegations in the charge, do not arise from the same factual circumstances, and Respondent would not necessarily raise the same defenses to the new allegations. *Redd-I*, supra; *Nickles*, supra.

I do not agree.

While the charges make no specific reference to a no-solicitation rule, the second amended charge in Case 34-CA-9686 does allege that since March 13, Respondent implemented a rule prohibiting employees from engaging in union or protected concerted activities in nonwork areas on nonworktime. This allegation is clearly broad enough to encompass a no-solicitation rule, and does in fact contain a definition of a no-solicitation rule. Therefore I conclude that the complaint amendments are "closely related" to the allegation of the charge, under *Nickles Bakery*, supra; and *Redd-I*, supra; see also *Payless Drug Stores*, 308 NLRB 1220, 1221 (1994).

Moreover, I also note that during the investigation of the various charges, Respondent's no-solicitation rule did come up, and in fact its position paper made reference to it, and its witnesses informed General Counsel that the rule that it posted at the store was the same as the rule in its manual. However, it turns out that these assertions were not correct, and that in effect Respondent maintained two no-solicitation rules, one in its manual, and the other, posted at the store. In these circum-

stances, Respondent can have no legitimate complaint about lack of notice.

Finally, the complaint was amended on the first day of the trial, and there was a hiatus of 10 days between hearing days. Thus, Respondent had ample opportunity to prepare and meet these complaint allegations, and suffered no prejudice from the late amendments. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992).

Accordingly, I reaffirm my ruling to grant the amendments and shall decide the issues on the merits.

With respect to the rule in the handbook, the record establishes that this rule prohibits solicitation or distribution on “store premises without written consent of your General Manager.” This rule is clearly overbroad and is presumptively invalid, since it encompasses periods that includes employee’s own time. *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992), *Our Way, Inc.*, 268 NLRB 394 (1988). Additionally, any rule that requires employees to secure permission from their employer as a precondition to engaging in protected conduct as an employee’s free time is unlawful. *Norris/O’Bannon*, supra; *Brunswick Corp.*, 282 NLRB, 794, 795 (1987).

Although there is no evidence that this rule has been enforced, that is no defense since it appears in Respondent’s manual which is distributed to employees. Such action restrains and interferes with employee’s rights under the Act, and is violative of Section 8(a)(1). *Staco Inc.*, 244 NLRB 461, 469 (1989). I so find.

The General Counsel also contends that Respondent unlawfully promulgated another no-solicitation rule on August 8, in response to the union solicitation by employees Roland and Reder on that date, in violation of Section 8(a)(1) of the Act. *Eagle Picher Industries*, 331 NLRB 169, 173 (2000); *Portsmouth Ambulance Service*, 323 NLRB 311, 320 (1997); *Cannondale Corp.*, 310 NLRB 845, 849 (1993).

In that regard, General Counsel relies on the testimony of employees Reder and Roland that they never saw the rule posted anywhere, until Schwartz posted it on August 8, after showing it to Roland. Moreover, the General Counsel also notes that Respondent has adduced no evidence that it had ever announced or shown the policy to any nonmanagement employees. However, I have credited the testimony of Respondent’s witnesses that the rule was posted by Respondent shortly before the store opened in various places, including a bulletin board, along with other notices to employees. In these circumstances, I cannot find, as General Counsel argues that this rule was promulgated³⁷ on August 8 in response to any union activity.

However, the General Counsel argues alternatively that the evidence supports the conclusion that even crediting Respondent’s witnesses (as I have done) that it posted the rule on or about March 15, that the promulgation of the rule on that date is unlawful and motivated by the appearance of the Union. In this regard, he relies heavily on the testimony of Lovell, who admitted that when he saw that Boyne receive a union card, it was a big issue, because it involved union solicitation, and that’s the

solicitation that he was concerned about. Moreover, Lovell testified to a meeting of managers in February, conducted by Perry, where she talked about the no-solicitation rule and told the managers that Respondent was trying to help the union out, and instructed them that if the Union came in to the store to solicit, managers should ask them to leave. Perry distributed a copy of the rule to the managers, and according to Lovell told them that managers did not have the right to talk to employees who are on breaks.

I agree with the General Counsel that the above evidence, as well as other record evidence, is sufficient to persuade me that Respondent promulgated this rule shortly before March 15 in response to an anticipated union organizational campaign, in violation of Section 8(a)(1) of the Act. Thus, Lovell’s testimony demonstrates that prior to the opening of the store, Respondent anticipated that the Union would be attempting organization of the store, that Respondent was determined to keep the Union out, and that this rule was one of the ways it would try to do so. More importantly, there is no evidence that Respondent had such a rule in any of its other stores and in fact both Lovell and Schwartz who worked at other stores for Respondent, never saw such a rule at these other stores where they worked. Additionally, the manual contains a different rule, which further suggests that the rule in question was promulgated only at the Westport store.

Finally, Perry, who as the human resource administrator, would be fully expected to be familiar with Respondent’s policies in this regard, did not testify about this subject, nor make any attempt to explain the discrepancy between this rule and the rule in the manual. Further, neither Ware nor Williams, other high company officials gave testimony in this area. It is therefore appropriate to draw an adverse inference from the failure of these witnesses to testify about these issues, and conclude that had they testified about such matters, they would testify that Respondent’s rule was instituted only at Westport, in anticipation of the Union organizing the store. *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994); *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987).

Further evidence in support of this conclusion is Reed’s admission that Respondent anticipated that the Union would be picketing when the store opened on March 15, at the all store meeting on March 14, when such picketing was mentioned and the fact that the Union had filed its first initial charge on February 16. All these facts lead me to conclude which I do, that Respondent prior to posting the rule fully anticipated that the Union would attempt to organize the store, and the rule was instituted in response to that belief. Therefore, Respondent has further violated Section 8(a)(1) of the Act. *Cannondale*, supra; *Portsmouth Ambulance*, supra.

E. The Termination Meeting of Lane

During the course of Lane’s termination on May 8, Bernier made several statements which General Counsel asserts are independently violative of Section 8(a)(1) of the Act.

In that regard, Bernier commented that he heard that Lane had been talking to the Union and had joined the Union. After Lane denied the accusation, Bernier replied that he heard that

³⁷ I note that the General Counsel does not contend that this rule is invalid or overbroad.

she had been talking to the head of the Union, had joined the Union, and asked why she had done that?

There can be little doubt that Bernier's statements to Lane that he had heard that Lane was talking to the Union and had joined the Union, unlawfully created the impression that Lane's union activities were under surveillance and are violative of Section 8(a)(1) of the Act. *Ichikoh Mfg. Co.*, 312 NLRB 1022, 1023 (1993); *Flexsteel Industries*, 311 NLRB 257 (1993), *Emerson Electric Co.*, 287 NLRB 1065 (1988). I so find.

I also conclude, in agreement with General Counsel, that the questioning of Lane as to why she had spoken to the Union is coercive. Thus, the question was asked by a high level supervisor, in his office, of an employee who was not an open union adherent, and was accompanied by other coercive statements as detailed above. *Structural Composites Industries*, 304 NLRB 729 (1991), *Rossmore House*, 269 NLRB 1176 (1984). Therefore, I conclude that Respondent has once again violated Section 8(a)(1) of the Act by Bernier's conduct.

F. The Termination of Lane

In assessing the legality of Respondent's termination of Lane, as well as the other alleged unlawful actions taken by Respondent as detailed below, it must first be determined whether General Counsel has established that a motivating factor in Respondent's decision was the union or protected activity of the employees. *Wright Line*, 251 NLRB 1083 (1980). Once the General Counsel has met that burden of proof, the burden shifts to Respondent to prove by a preponderance of the evidence, that it would have taken the same action absent the employee's protected conduct. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Here I conclude that General Counsel has presented compelling evidence that a motivating factor in Respondent's decision to terminate Lane was her union activities.

Thus, Lane was hired on April 12. On April 30, she discussed the union's picketing outside the store with a customer and was overheard by Griffin. Griffin reported what she had overheard to Reed, Bernier, and Reder, including the statement by Lane to the customer, "I might join them," referring to the union pickets.

Thus, there can be no question that Respondent was aware of Lane's union activity, and the testimony of Bernier to the contrary is not credited. Indeed, as I noted above, Griffin, Respondent's supervisor, admitted informing both Reed and Bernier that she overheard Lane telling the customer that she might join the pickets. Additionally, and significantly, Lane was terminated about a week after this conversation with the customer. This "astonishing timing" provides substantial evidence of antiunion motivation. *Fiber Products*, 314 NLRB 1169, 1186 (1994); *NLRB v. Long Island Airport Limousine*, 468 F.2d 292, 295 (2d Cir. 1972); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995). Indeed, "timing alone may suggest antiunion animus as a motivating factor in an employer action." *Cell Agricultural Mfg. Co.*, 311 NLRB 1228, 1232 (1993); *Trader Horn*, supra; *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Here, the record contains much more substantial evidence of discriminatory motivation, in addition to the suspicious timing. Thus, Respondent as I have detailed above, committed a number of significant violations of Section 8(a)(1) of the Act, including threats to suspend or discharge employees for their union activities, as well as several 8(a)(1) violations committed by Bernier during the course of the termination interview with Lane.

Additionally, Reder's credible testimony establishes that immediately after Griffin overheard Lane's conversation with the customer, Griffin informed Reder "we finally have a way to get rid of Diane Lane. She was talking to the Union head." Griffin then added that when Bernier hears about it, "he is going to blow his top." The very next day, after Reder reported Griffin's conversation with her to Cota and Reed, Cota instructed Reder to prepare a list of problems with Lane's work so they could give it to Bernier when he returns to work. Reder complied and prepared the list of problems with Lane's performance, including that Griffin had informed Reder that Lane "had been talking to the Union."

Finally, and most importantly of all, at the end of the termination interview, after Bernier had unlawfully interrogated Lane and created the impression that her union activities were under surveillance, he said that since Lane had been talking to the Union, "maybe we should just part ways here" and "this is your last day."

The above evidence is more than sufficient to establish a strong link between the discharge of Lane and her union activities. Thus, since General Counsel has made a strong prima facie showing of discriminatory motivation, Respondent's burden of proof with *Wright Line* is substantial. *Vemco, Inc.*, 304 NLRB 911, 912 (1991); *Eddyleon Chocolate Co.*, 301 NLRB 887, 889 (1990).

I conclude, in agreement with General Counsel, that Respondent has fallen far short of meeting its burden in this regard. Bernier testified that he decided to terminate Lane, because after only 3 weeks of employment, he received numerous complaints about Lane's performance from Reder and Griffin, as well as a complaint from Jim Ware (Bernier's supervisor). These complaints dealt with poor customer service and her inability to get along with other employees. While Respondent did establish that Bernier did in fact receive several complaints from these supervisors about Lane, it failed to establish that it would have terminated Lane for these problems, absent her union activities.

Thus, Respondent admits that it never issued any warnings to Lane that her job was in danger because of these problems with her performance. This failure undermines Respondent's efforts to meet its *Wright Line* burden of proof. *Allegheny Ludlum Corp.*, 320 NLRB 484, 505 (1995).

This failure is even more significant in light of the evidence that Respondent normally utilizes a progressive disciplinary policy, consisting of verbal warnings (which are documented), written warnings, and suspensions, prior to discharging employees. The failure of Respondent to follow its normal progressive disciplinary procedures is significant evidence of discriminatory motivation and evidences pretext. *Stoddy Co.*, 312

NLRB 1175, 1183 (1993); *Marriott Corp.*, 310 NLRB 1152, 1159 (1993).

Even worse, the evidence reveals that Respondent treated Lane significantly different than other employees who engaged in similar or even more egregious conduct than Lane. I have detailed in the facts section of the decision numerous examples of Respondent's more tolerant attitude toward conduct of employees such as Bayliss (issued three written warnings for various infractions, including insubordination and "lackadaisical" attitude), Cancelli (only a written warning after leaving the job without permission, and having an altercation with a customer), Krynick (received only a warning for speaking to co-workers in an unbecoming behavior, and causing a scene that disrupted work), Gilmore (received several documented verbal counselings, and a number of written warnings, and employee's conduct included raising her voice to the manager and making derogatory comments to other employees, employee finally quit), and Diaz (received documented verbal warning, and three written warnings).

The above evidence of disparate treatment of employees substantially detracts from Respondent's attempt to meet its *Wright Line* burden of proof. *Ellicot Development Square Corp.*, 320 NLRB 762, 774-775 (1996), *enfd.* 104 F.3d 354 (2d Cir. 1996); *Pope Concrete Products*, 305 NLRB 989, 990 (1991); *Stoddy*, *supra*.

Respondent attempts to explain its departure from utilizing its progressive disciplinary policy, by Bernier's testimony that Lane was only employed by Respondent for a period of 3 weeks. However, it introduced no evidence that its progressive disciplinary policy was not to be applied to employees employed for any particular period of time, nor any evidence that it employed a "probationary" period of any particular time.

More importantly, the record discloses that in several instances, such as employees Diaz and Gilmore, Respondent issued documented verbal warnings to these employees within 30 days of the start of their employment. This evidence effectively undermines Bernier's testimony that Lane's short-term employment explained Respondent's failure to use its progressive disciplinary policy.

Accordingly, based on the foregoing, I conclude that Respondent has failed to establish that it would have terminated Lane absent her union activities, and that it has therefore violated Section 8(a)(3) of the Act by such conduct.

G. The Reduction of Hours of and Refusal to Give Reder a Set Schedule

An analysis of these allegations in the complaint must also utilize the *Wright Line* framework, inasmuch as their resolution is dependent upon Respondent's motivation for these actions.

In this regard, Reder after giving up her supervisory position to become a clerk, engaged in several acts of protected conduct. On August 8, she and Roland distributed union authorization cards to employees inside the store. On August 28, at a department meeting, Reder and fellow employee Magner engaged in a heated discussion about the union, and the newspaper article that accused Bernier of threatening employees with discharge if they talk about the Union. Magner disputed the reports in the article about Bernier. Lane argued with Magner,

and asserted that she was there when Bernier fired Lane and he spoke to her about talking to the Union and fired her during that conversation. Thus, Reder asserted, "to me that looks like she was fired for talking to the Union." Coppola then chimed in that this was not true and Reder replied that she wasn't lying and she knew what she heard. Coppola then made some additional antiunion statements, as did Magner, and Magner eventually stormed out of the meeting. Thus, Reder clearly engaged in protected concerted conduct at the meeting, by speaking up in favor of the Union, and supporting the union's position as expressed in the newspaper article concerning Bernier's conduct.

Reder continued to engage in protected conduct, when she was summoned into Bernier's office. He criticized her for "defaming him" at the meeting, as well as for talking to the reporter. In that regard, Reder's conduct in speaking to the reporter about Coppola's actions in distributing antiunion literature is also protected concerted activity. Reder and Bernier then argued about what Bernier claimed was her "defaming" him at the meeting, and Reder insisted that she was merely telling the truth about what she heard during the termination meeting with Lane that Reder attended when she was a supervisor. This conduct is also protected activity on the part of Reder.

As noted above, I have found that during the August 28 meeting, Bernier violated Section 8(a)(1) of the Act by threatening to suspend Reder in retaliation for her protected conduct. This resulted in another unfair labor practice charge filed by the Union on September 5, and served upon Respondent on September 10.

Finally, on September 19, Reder received a complaint from an employee that Reder had pressured them to sign union cards, and Reder instructed that employee to prepare a memo to that effect, which also reflected that Reder had asked another employee to sign a card. This is of course additional protected conduct by Reder.

The issue then becomes, whether such concerted conduct were motivating factors in any of the actions taken against her by Respondent. Once again, the timing of Respondent's actions are highly suspicious. Reder's hours were reduced from 22 to 10 on September 13, a mere 2 weeks after the August 28 meeting and her confrontations with Bernier about the meeting, and even more significantly, a mere 3 days after the unfair labor practice charge filed by the Union, with respect to the August 28 threat to suspend Reder was served on Respondent. Moreover, the animus displayed by Respondent towards Reder's protected conduct is manifested by Bernier's unlawful threat of August 28, as well as by Coppola's arguing with Reder about Bernier's conduct and her antiunion statements at the department meeting. Additionally, I rely on the animus detailed above, as demonstrated by the unlawful discharge of Lane and the numerous 8(a)(1) violations set forth that I have found.

Based on the above, I conclude that the evidence is more than sufficient to establish that a motivating factor in Respondent's decision to reduce Reder's hours on September 13, and

to thereafter refuse to assign her a set schedule was motivated by her protected conduct.³⁸

Once more, as in the case of Lane's termination, General Counsel's prima facie showing is strong, which requires substantial evidence by Respondent to meet its *Wright Line* burden of proof. *Vemco*, supra, *Eddyleon Chocolate*, supra.

I conclude that Respondent has again failed to meet its burden of proof in this regard. It relies solely on the testimony of Coppola, which I found to be unconvincing. Coppola asserts that she reduced Reder's hours because she could not rely on her. Coppola points to several factors that allegedly led to her conclusion in this regard. They include the fact that Reder had not gotten back to her by September 12 as to her availability and her response to Coppola's proposed schedule given to Reder on September 10. However, I find this assertion specious. First of all, contrary to Coppola's testimony, I have found that Coppola did not decide to reduce Reder's hours on September 12, but on September 13, and only after Reder had gotten back to her on September 13, indicated her availability and had told Coppola that she could work 4 of the 5 days that Coppola had proposed for her on September 10. I note that the only day that Reder could not work was Sunday, and the record is clear that Reder never worked on Sunday before, and Coppola was aware of this fact.

Coppola also testified that she was informed by Reder's mother on Saturday, September 8, that Reder was "trying out a new job," that Reder had the previous week given insufficient notice to Coppola about her vacation plans, and that when Reder called in on Friday, September 2, to report her absences on September 11 and 12, she failed to speak to a manager about the matter.

I note however that on September 10, Coppola gave Reder a proposed temporary schedule for 22 hours, notwithstanding that all of these events had already taken place. Thus, if Coppola could not rely on Reder, based on these events why did she propose to her a schedule of 22 hours on September 10. Therefore it appears that the receipt of the unfair labor practice charge by Respondent on September 10 was the motivating factor, in Coppola's sudden decision that she no longer needed Reder, and not these other events that Coppola asserted. Moreover, Coppola did not mention to Reder on September 13 when she notified Reder about the reduction in hours, any of these issues or even any claim that Coppola could not rely on her. The only thing that Coppola said to Reder in explanation of why her hours were reduced was simply, "this is all I need you for." This assertion is of course dubious, since 3 days earlier, on June 10, Coppola needed Reder for 22 hours, and during August, Reder's last 3 regular weeks, Reder was "needed" for 22 hours.

In this regard, Respondent argues that the need for Reder's services had decreased, due to the restructuring of the front end,

³⁸ In this regard, Respondent argues that it scheduled her for 21 hours for the week of September 9–15, which occurred after the August 28 meeting. While this may be true, I find that the September 5 charge was served upon Respondent on September 10, reminded it of the August 28 protected conduct by Reder, and increased its antagonism towards her and motivated its action on September 13.

which necessitated the transfer into the department of Mike Keough as a full-time employee who replaced Roland, a part-time employee, and the hiring of Tisha Innocone a full-time employee on September 19. However, since Coppola did not testify that she reduced Reder's hours because she didn't "need her," it cannot rely on that defense to meet its *Wright Line* burden. In any event, Respondent has given no explanation as to why it needed Reder for 22 hours on September 10, but suddenly 3 days later, it only needed her for 10 hours. Indeed, Coppola knew that Reder could be available for the 22 hours that she had been regularly assigned previously, so Coppola's testimony that she could not rely on Reder is highly suspect.

Therefore, based on the foregoing, I conclude that Respondent has failed to establish that it would have reduced Reder's hours absent her protected conduct, and that it has therefore violated Section 8(a)(1), (3), and (4) of the Act.

Turning to the allegations of refusal to give Reder a set schedule, the record establishes that generally she received a set schedule. The hours were increased to 22 shortly after Coppola replaced Griffin as manager in August. For most of August her schedule was identical, 12:30–6 Mondays, 8–1 on Tuesdays and Thursdays, and 11:30–8 on Wednesdays. I note that the proposed temporary schedule given to Reder by Coppola in September, although representing a minor reduction in total hours from 22 to 21, did represent a significant change in the days and hours, since it provided for 4 hours on Sunday, changed Reder's Monday hours to 10–2 from 12:30–6, and changed her Wednesday hours from 11:30–5 to 8–1. Notably, even after Reder changed her hours at her other job, to accommodate this change, so that she could work 18 of the 22 hours, proposed by Coppola, Coppola rejected this offer, and reduced her hours to 10, assigning her only to work Tuesdays and Thursdays from 8–1. For the next week, September 23 to 29, Reder was again scheduled for 10 hours, but this time on different days, Wednesdays and Thursdays from 8–1. Reder complained to Coppola about this change, and noted that she had arranged her schedule at her other job to accommodate the prior schedule. Reder asked if the hours were permanent, and Coppola replied, "no" and said that she would not give Reder permanent hours. Reder explained that she needed a set schedule because of her other job, that Coppola was so aware, and asked why she could not have set hours like everyone else? Coppola continued to refuse to promise Reder a set schedule and added that she will put Reder on the schedule "when I need you." It is significant to note, that during the week of this conversation, on September 19, Reder had spoken to employees about the Union, and Respondent documented these activities in its files, thus providing additional evidence of protected activities of Reder and Respondent's motivations for Coppola's unexplained refusal to give Reder a set schedule.

In that regard, Coppola provided no explanation for her failure to give Reder a set schedule, and in fact testified that normally employees do not receive set schedules. However, this testimony is refuted by Respondent's records, as well as Coppola's admission that several members of the department did in fact receive set schedules, and that it was not unusual for part-time employees, who normally have other jobs to have set schedules, of course, most importantly of all, Reder herself had

been given a set schedule prior to August 28, and it was only after that date, and after the charge filed by the Union on Reder's behalf, that Coppola decided to put her on the schedule "when I need her," and not give her a set schedule, contrary to prior practice, and contrary to how she treated other employees.

In such circumstances, I conclude that Respondent has failed to establish that it would have refused to give Reder a set schedule, absent her protected conduct, and that it has therefore further violated Section 8(a)(1), (3), and (4) of the Act.

H. The Alleged Termination of Mary Roland

The resolution of the complaint allegation dealing with Roland must start with an assessment of whether or not she was terminated as the General Counsel contends, or that she voluntarily quit her employment as asserted by Respondent.

In that regard, I have credited the mutually corroborative testimony of Coppola and Reed, supported by their contemporaneous memos of the relevant events, that Reed informed Roland of her transfer to the front end as a cashier, effective at the end of the week. Reed added that Roland would work the rest of the week in natural living and that Reed would sit down later in the week with Roland to discuss her schedule, new duties, and anything else she needed. However, notwithstanding these instructions from Reed, Roland took it upon herself to go speak with Doshno, the front-end supervisor who informed Roland that there was no availability for her in the front end for the hours that she had worked.

After Roland informed Coppola of what Doshno had said, Coppola twice asked Roland to wait until Coppola finds out what is going on? Roland however, refused to wait, informed Coppola that she was leaving, and accused Respondent of making "a very big mistake." Roland then left, and made no further attempts to contact Respondent.

In these circumstances I am constrained to find that Roland in fact voluntarily quit her job for Respondent, and was not terminated as alleged in the complaint. The General Counsel argues that there was no job for her at the front end, and that is an effective termination. However, the fact is that Reed, the store manager, informed Roland that she would be transferred to the front end, effective the next week, and they would meet later in the week to discuss hours and scheduling. Roland was aware that Reed as the store manager was in charge of the store, and that Doshno reported to Reed. In my view it was incumbent upon Roland to have waited to speak with Reed or Coppola to straighten out the confusion caused by Doshno informing Roland that she was not needed for the hours of Roland's availability. I believe that Roland was not interested in working as a cashier, and that she was upset about her transfer. Therefore, she voluntarily quit her job with Respondent. In such circumstances, the complaint allegation alleging that she was terminated because of her protected conduct must be dismissed. *IBP, Inc.*, 330 NLRB 863, 865-866 (2000).

I note that the complaint does not allege that the transfer of Roland to the front end was discriminatory, nor that Roland was constructively discharged by such conduct. Therefore I

need not and do not make any findings and conclusions as to these issues.³⁹

Accordingly, I recommend dismissal of the complaint allegation as to Roland.

I. The Refusal to Hire

The criteria for establishing a violation of the Act in refusal to hire or refusal to consider for hire cases, is set forth in *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). The General Counsel must establish that Respondent excluded applicants from the hiring process, that Respondent was hiring or had plans to hire, the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, and that antiunion animus contributed to the decision not to hire or consider the applicants for employment. Once the General Counsel establishes these elements, the burden then shifts to Respondent to show that it would not have considered the applicants for hire or hired them, even in the absence of their union activity or affiliation.

Here there is no question that Respondent was hiring employees, and that it refused to consider hiring any employees previously employed by Food For Thought. Additionally, there can be no doubt that all of the discriminatees had the experience and training relevant to the positions offered by Respondent. Indeed, all of them were previously employed by Respondent when it owned the Food For Thought store, 500 yards away from the instant store. Since they were all qualified to work for Respondent at the Food For Thought store, and Respondent adduced no evidence that it had any different or new job requirements for employees at the Westport store, I conclude that the General Counsel has established that element of its case.

That leaves the issue of whether antiunion animus contributed to the decision of Respondent not to consider the former Food For Thought employees, and not to hire the discriminatees. In that regard, it is undisputed that the former Food For Thought employees had voted for union representation shortly before Respondent sold the Norwalk store. Thus, Respondent was aware of this fact and in my judgment was likely to believe that if it hired Food For Thought employees at the Westport store, a similar result would be likely. This is a result that Respondent obviously was intent on preventing. All of its witnesses conceded that Respondent was firmly opposed to unionization at any of its stores.⁴⁰ Moreover, two of the discriminatees involved herein, Silveira and Louis testified on behalf of the Union at the National Labor Relations Board trial in Case 34-CA-9243 in February 2001. Additionally, Beverly Hammons, another discriminatee, was alleged in Case 34-CA-9278 to have been discriminatorily transferred from natural living to a cashier position. That was settled before trial, but clearly Respondent would have perceived Hammons, Silveira, and Louis to be likely union supporters.

³⁹ I do note that there is no loss of pay involved in the transfer, nor any evidence submitted that the cashier position is a more onerous job than a clerk.

⁴⁰ Indeed the Norwalk store was the first one out of over 100 stores in the USA and Canada to be successfully organized.

I find more than sufficient evidence to conclude that anti-union animus contributed to Respondent's decisions with respect to hire. I note initially the substantial amount of animus towards union activities of Respondent's employees, that I have found above, including the unlawful discharge of Lane, the reduction of hours of Reder, and numerous 8(a)(1) violations, such as threats to discharge and threats to suspend employees for their union activities. I also rely on the animus found by Judge Marcionese in his decision, particularly, his finding that Respondent by its CEO Gilliland violated Section 8(a)(1) of the Act by promising benefits to and soliciting grievances from employees. Thus, this finding establishes that the CEO of Respondent, took the trouble to come from Colorado, Respondent's main office to meet with employees and attempt to convince them to vote against the Union. This is particularly significant, since the decision not to hire Food For Thought employees was apparently made by representatives at Respondent's main Colorado office.

In addition to the substantial amount of animus, as detailed above, I also rely on the credited testimony of Reder, that while she was a supervisor of Respondent, she was informed by fellow Supervisor Griffin that people were not hired by Respondent because they were union people, and that union people were not coming into the store because they would start something going. Similarly, Reder also heard one of Respondent's other supervisors say that Respondent did not want "moles" in the store, and did not want "moles from Food For Thought to come to the store to start up union proceedings." Reder then asked, "what is a mole?," and a supervisor told her, "a mole is somebody from Food For Thought who would get people to join the Union" and that Respondent should look out for people who were moles. The above credited testimony provides compelling evidence of a link between the decision not to consider or hire former Food For Thought employees and their union activities or affiliation.

Accordingly, once more I conclude that, the General Counsel has presented a strong prima facie case, requiring Respondent to produce substantial evidence to meet its burden of proof. *Vemco*, supra; *Eddyleon Chocolate*, supra.

Respondent contends that it has met its burden of proof, by what it views as uncontradicted testimony of Williams, that its decision was based solely on the fact that Respondent had entered into a no-raid agreement with Grange, wherein Respondent agreed not to hire any Food For Thought employees.

However, this defense is severely undermined by the terms of the "no raid" agreement itself. Thus, the agreement provides that Respondent shall not hire former Food For Thought employees only for a period of 6 months from the closing. The facts reveal that this portion of the agreement was due to expire on February 6. Respondent did not start hiring any unit employees until February, its planned opening was March 15, and none of the discriminates applied for employment until after the deadline expired. Thus, Respondent's reliance on this agreement as having motivated its decision not to hire Food For Thought employees is highly dubious. Williams' testimony concerning the alleged decision, is even more problematic.

According to Williams, in late November 2000, he was informed by Brier, Respondent's General Counsel that the West-

port store would be opened and needed to be staffed, and because of the no-hire agreement in the purchase agreement, which she allegedly showed to Williams, she informed Williams that Respondent was not allowed to hire any current employees from Food For Thought. Williams further testified that he then telephoned Perry in December and informed her that in her staffing of the store, she was not to hire any current Food For Thought employees because of the no-hire agreement.

Williams' testimony in this regard is undermined by several factors. First, Perry's testimony contradicts him in that according to her, while in December Williams did inform her of the decision not to hire Food For Thought employees, he did not inform her at that time of the no-hire agreement, or any other reason for this decision.

Secondly, Williams incredibly testified that although when he saw the no-hire agreement, he noticed that it contained a 6-month limitation, which would have expired well before Respondent's planned opening, he claims that this limitation was not discussed during his conversation. I find this testimony hard to believe, and even if true, difficult to understand from the point of view of Brier, who gave the instruction to Williams. Thus, Respondent claims that it had made the decision to open the store, notwithstanding its clear violation of the non-compete portion of the agreement, and at the same time decided to comply with the no-hire portion of the agreement, which was due to expire before Respondent was to open, and before it planned to hire employees. Therefore, it allegedly decided to clearly violate one portion of the agreement, while at the same time deciding to comply with another portion of the agreement, (the no-hire) which in fact Respondent would not be violating, since any hiring would take place after the 6-month limitation expired. This is a rather inexplicable business decision, which Respondent made no attempt to explain.

This failure to do so, highlights perhaps the most significant defect in Respondent's failure to meet its *Wright Line* burden of proof. It is well settled that the failure of an Employer to call the decisionmaker to explain why it took certain action, is highly damaging to the Employer's defense, and gives rise to an adverse inference that testimony by such a witness, if offered would not be favorable to the Employer's case. *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999); *United Parcel Services of Ohio*, 321 NLRB 300 fn. 1, 308-309 fn. 21 (1996); *Ready Mixed Concrete Co.*, 317 NLRB, 1140, 1143 fn.16 (1995); *Basin Frozen Foods*, 307 NLRB 1406, 1417 (1992); *White Plains Lincoln-Mercury*, 288 NLRB 1133, 1150 fn. 13 (1988).

I find the above precedent dispositive here, since the evidence discloses, contrary to Respondent's contention that Brier (or perhaps someone else in the company, such as Gilliland) made the decision not to hire the Food For Thought employees, and not Williams. Thus, it is clear from Williams's testimony that he made no decisions on whether or not to hire Food For Thought employees, but was merely relaying instructions given to him by Brier as to this issue of a decision made either by Brier herself, or as is more likely, by some higher official such as Gilliland. Indeed it appears to me that the decision not to hire, made in conjunction with the decision to open the store in contravention of the terms of the noncompete agreement, would

have been made at the highest levels of the corporation, and that Gilliland as the CEO would have made or least approved of such decisions.

In any event, Respondent has failed to call Brier, Gilliland, or anyone else involved in the decision not to hire the Food For Thought employees (even though the terms of the no-hire clause would have expired well before the opening), and at the same time agreeing to open the store in clear contravention of the noncompete portion of the agreement. The absence of any such testimony leads to the adverse inference that such testimony would not be favorable to Respondent, and the further conclusion that Respondent did not rely on the agreement when it decided not to hire Food For Thought employees.

Respondent attempted to explain away the 6-month limitation in the agreement by the testimony of Williams. Respondent contends that Williams' testimony, coupled with a letter from Clapp to Brier, establishes that in January, Brier and Clapp reached an agreement to continue the terms of the no-hire agreement, because Clapp had threatened to sue Respondent for its violation of the noncompete portion of the agreement, and Respondent wished to minimize its damages.

However, my examination of Williams's testimony in this regard, reveals it to be inconsistent, and unconvincing and I do not credit same. Thus, on direct testimony he asserted that Brier informed him in January that Grange intended to sue Respondent and that during her discussion with Clapp about the suit, she reached a verbal agreement with Clapp to extend and continue the no-hiring agreement. On cross examination, Williams backtracked from that testimony and asserted that Brier did not inform him of an agreement with Clapp to extend the no-hire agreement, but that he "imagined" that there was such an agreement, since she directed him to continue to apply the no-hire clause.

On examination of the undersigned, Williams contended that Brier told him that Respondent was going to be sued by Clapp and that Respondent needed to continue not to hire Food For Thought employees. According to Williams, he had no discussion about an extension of the agreement or the 6-month limitation contained therein. Most importantly, the letter introduced into evidence by Respondent, confirming this agreement allegedly made by Brier and Clapp in January to extend the terms of the no-hire agreement, was dated March 16, and refers to a "recent" phone conversation between Clapp and Brier about that subject. It is undisputed that by March 16, Respondent had hired virtually its entire staff at the new store.

Thus, based on this evidence alone, Williams' testimony cannot be credited that any agreement was reached in January to extend the terms of the no-hire agreement. However, an even more significant factor leads to that conclusion, and that is again the absence of any testimony from Brier. Indeed, Williams' testimony as to this issue is pure "hearsay," since he had no discussions with Clapp. It was Brier who allegedly agreed with Clapp in January to extend the terms of the no-hire agreement past the 6-month limitation, but Brier did not testify. It was also Brier who allegedly decided that Respondent would extend the terms of the no-hire portion of the agreement, in order to minimize Grange's damages in a potential law suit. Thus, the absence of Brier's testimony as to these two crucial

matters is highly damaging to Respondent's case, and once again, pursuant to the precedent cited above, leads to an adverse inference that such testimony would not be favorable to Respondent. I therefore conclude that consistent with the date on the March 16 letter, that any agreement was not made until after Respondent staffed its store, and after it refused to hire the discriminatees herein. Therefore, Respondent's attempt to justify its refusal to hire the discriminatees on the basis of such an alleged agreement is clearly pretextual and is rejected.

Respondent in attempting to meet its *Wright Line* defense, also relies on the testimony of its supervisors that Respondent recruited at several stores, known to be represented by the Union, and that in fact as a result of that recruitment, Respondent hired between 20–25 employees from these unionized stores. I place little reliance on such testimony. Initially, I note that none of Respondent's witnesses provided any names of any of these employees whom it allegedly hired from these unionized stores. Nor did it provide any documentary evidence such as job applications, payroll records, or any other evidence to support the testimony of its witnesses in this regard. Since it is Respondent's burden under *Wright Line* to establish its defense, and that burden is particularly strong here in light of the strong prima facie showing of the General Counsel, the failure of Respondent to adduce such evidence detracts from its defense.

Moreover, even accepting the testimony of Respondent's witnesses as to this issue, would not be sufficient to meet Respondent's burden of proof. Thus, I note that the employees at these other stores have been represented by the Union for a substantial amount of time. Therefore, it may be that the employees involved were union members, solely because of the union-security clause in the contract. In any event, none of these stores, insofar as this record discloses, were recently organized, as was the Food For Thought store. Moreover, the Food For Thought store was closed by Respondent shortly after the election, which would likely increase the militancy of the Food For Thought employees and their desire to support union representation should they be hired by Respondent. Finally, the evidence does not disclose whether or not higher management in Colorado, who made the decision not to hire the Food For Thought employees, was aware of or ever notified about the decision of local supervisors to recruit at unionized stores. Therefore, for the above reasons, I conclude that the significance of the evidence of Respondent's hiring 20–25 employees from unionized stores is minimal, and far from sufficient to meet Respondent's strong burden of establishing that it would have refused to hire the discriminatees absent their union affiliation.

That leads me to the next issue for consideration, that of who should be considered applicants for employment, and therefore discriminatees. Respondent's answer admits that it refused to hire or consider for hire applicants Silveira, Louis, Clark, Monteleone, and Sandola. Therefore, there is no question that they must be considered discriminatees, and since I have concluded that Respondent has not met its burden of proof, that it has violated Section 8(a)(1) and (3) of the Act by refusing to hire these employees.

That leaves employees Laloi, Hammons, and Parikh, who Respondent denies that it refused to hire, since they did not file

applications for employment with Respondent. With respect to Laloi, a significant credibility resolution must be made, as Respondent contends that Laloi's testimony that he was denied an application by Rob (O'Neil) when he attempted to apply for a job with Respondent on or about February 6 must be discredited. Respondent argues, with some justification, that this testimony is inconsistent with the testimony of all of the other 25 witnesses, including several witnesses for the General Counsel, that Respondent gave applications to everyone who applied, including former Food For Thought employees.

However, notwithstanding this contradictory testimony, I am disposed to credit Laloi's testimony in this regard. I do not believe Laloi would be likely to simply make up such a detailed scenario as he furnished with his testimony, and his version of events seems plausible to me. Thus, although ordinarily Respondent did give applications to everyone who asked, in Laloi's case, O'Neil, who knew Laloi from Food For Thought told him that he could not apply. While this is contrary to Respondent's normal procedure, O'Neil may have felt that he was doing Laloi a favor by denying him an application, since O'Neil knew that Laloi would not be hired. Thus, O'Neil could have felt that he was helping Laloi by not wasting his time filing an application that could not result in Laloi being hired.

I find this to be a reasonable explanation for Respondent's departure from its normal procedure, and in the absence of any testimony from O'Neil denying Laloi's testimony, it is once again appropriate to draw an adverse inference from Respondent's failure to call O'Neil as a witness.⁴¹ Having credited Laloi that Respondent denied him an application for employment, it follows that Laloi must be considered a discriminatee, and that by denying him an application, Respondent has refused to consider him and refused to hire Laloi in violation of Section 8(a)(1) and (3) of the Act. *M&M Electric Co.*, 323 NLRB 361, 369-370 (1997); *Flour Daniel, Inc.*, 333 NLRB 427, 447 (2001).

Turning to Hammons and Parikh, they attempted to apply for employment in February, even though they had heard from other employees that Respondent was not hiring Food For Thought workers. After they received their applications and while they were discussing benefits with Perry, Hammons asked if it made any difference that the employees worked for Food For Thought. Perry replied, "that it does make a difference," and explained that while Respondent would take their application, it would put them in a separate file. Perry added that she didn't know if the employees would be hired, but she could not talk further with them about job openings. The employees asked if they could take their applications with them to fill out, since their break for Food For Thought was over. Perry replied, "no," that they could not take the applications outside the door. Perry did suggest that the employees return on Saturday when she would be at the store, to complete their applications. The employees left and did not return on Saturday or any other day to fill out their applications.

⁴¹ I also note that while Perry generally denied that Respondent failed to give an application to anyone, she did not deny Laloi's specific and detailed testimony, and did not deny that O'Neil was involved in the hiring process.

Based on the above circumstances, I conclude, in accord with longstanding Board precedent, that it would have been futile for the employees to have returned on Saturday to file applications, as Perry suggested, and Respondent cannot rely on their failure to do so to disqualify them from being considered discriminatees. *Shortway Suburban Lines, Inc.*, 286 NLRB 323, 326 (1987); *Sherwood Trucking Co.*, 270 NLRB 445, 448 (1984); *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 81 fn. 10 (1979); *enfd. in pert. part* 640 F.2d 1094 (9th Cir. 1981); *Mason City Dressed Beef*, 231 NLRB 735, 748 (1977); *Macomb Block & Supply, Inc.*, 223 NLRB 1285, 1286 (1926).

Indeed Respondent's own witnesses admit that it would have been futile for these employees to apply, since their applications would have been placed in a separate "no" pile, and they would not have been hired. This conclusion was effectively communicated to the employees by Perry informing him that it made a difference that they were Food For Thought employees, that their applications would be placed in a separate file and that she could not talk further with them about job openings.

Accordingly, I find that Respondent also violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire Hammons and Parikh.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating employees concerning their activities on behalf or support for Local 371 United Food and Commercial Workers International Union, AFL-CIO (the Union), creating the impression that the union activities of its employees are under surveillance, threatening its employees with discharge, job loss, suspension, loss of benefits or other unspecified reprisals, if they engage in activities on behalf or support of the Union, or if the Union becomes the collective-bargaining representative of its employees, by maintaining an unlawfully broad no-solicitation rule, and by unlawfully promulgating a no-solicitation rule in response to the Union's organizational campaign, Respondent has violated Section 8(a)(1) of the Act.
4. By refusing to consider for hire all employees employed by Food For Thought, and by refusing to consider for hire and refusing to hire Julius Laloi, Libya Silveira, Rosette Louis, Beverly Hammons, Rajshree Parikh, Steven Clark, Teresa Monteleone, and Maria Sandalo, by terminating Diane Lane, and by reducing the hours of Rosemary Reder and refusing to give her a set schedule, because of their support for or activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.
5. By reducing the hours of Rosemary Reder and refusing to give her a set schedule, because NLRB charges were filed on her behalf by the Union, Respondent has violated Section 8(a)(1) and (4) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. The Respondent has not otherwise violated the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in various unfair labor practices, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer positions to the applicants unlawfully denied hire by Respondent referred to by

the Board in *FES* as “instatement,” and to make them as well as Lane, and Rosemary Reder whole for any loss of pay and benefits caused by Respondent’s discrimination against them. All backpay provided shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]